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FCC Record

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Federal Communications Commission Record

Volume 7
Issue 16

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemaking Numbers..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... x

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 4834

Federal Communications Commission Record

Table of Cases
Volume 7
Issue 16

Case Name	Page
AT&T Communications	4983
Access for 800 Service - Ameritech Operating Companies	4969
Access for 800 Service - Bell Atlantic Telephone Companie	4973
Access for 800 Service - BellSouth Telecommunicions, Inc.	5035
Access for 800 Service - GTE Service Corporation	5039
Access for 800 Service - NYNEX Telephone Companies	5014
Access for 800 Service - Pacific Telesis	5042
Access for 800 Service - US West	5050
Access for 800 Service - United Telephone Companies	5046
Advisory Committee on Advanced Television Service	4982
Allnet Communication Services, Inc.	4881
Allnet Communication Services, Inc.	4885
Allnet Communication Services, Inc.	4911
Amendment of Part 2 - Importation of Radio Frequency Devices	4960
Amendment of Part 97 - Special Temporary Licensing	4988
Amendment of Parts 0, 1, 2 and 95 - Video Data Services	4923
Amendment of Parts 1 and 73 - Modifications by Application	4943
Amendment of Parts 21, 22, 23, and 25 - Reporting Requirements	5066
Amendment of Section 331 - Communications Act of 1934	4905
Amendment of Section 90.631 - Loading Requirements for 900 MHz	4914
Amendment of Sections 1.23 and 1.24 - Conduct of Attorneys	4996
American Telephone and Telegraph Company	4931
Annual 1989 Access Tariff Filings	4941
Annual 1990 Access Tariff Filings	4939
Annual 1991 Access Tariff Filings	4937
B&G Broadcasting, Inc.	4977
Bayer, David A.	5054
Charter Network Company, L.P.	4864
Charter Network Company, L.P.	4865
Commonwealth Broadcast of Northern California	4951
Competitive Telecommunications Association	4863
Conflicts Between Applications and Petitions	4917
Consumer Alert Accessing Long Distance Carriers	4993
Equal Access Obligations of Cellular Carriers	4987
Fitts, William E.	4909
Haynie, Thomas M.	4994
Interactive Video and Data Service	5060
L.D.C. Consultants	5012
Liberty University, Inc.	4928
MCI International, Inc.	5009
Manual for Filing International Traffic Statistics	4965
McNulty Broadcasting Corp.	4860

Case Name	Page
Media Partners, L.P.	4862
Micronet, Inc.	5011
Midyear 1986 Access Tariff Filings	4984
Modifying Renewal Dates/Revision of FCC Form 303-S	4948
Modular Personal Computers / Upgrades of Digital Devices	4866
Motorola Satellite Communications, Inc.	5062
Murphy, Wayne C.	4877
Nemont Telephone Cooperative	4986
Newspaper Association of America	4964
Northern California Public Safety Plan	4908
Paulos, Lucinda Felicia	4856
Red Greensboro F Partnership	4906
Regulatory Reform for Local Exchange Carriers	5023
Revision of Part 15 - Digital Devices	4872
San Francisco Century Broadcasting, L.P.	4857
Southwestern Bell Telephone Company	5019
Southwestern Bell Telephone Company	4985
Table of Allotments, FM, Bayou Vista, LA	5007
Table of Allotments, FM, Bishop and Benavides, TX	5000
Table of Allotments, FM, Cleveland and Belzoni, MS	4840
Table of Allotments, FM, Decatur, Petal and Newton, MS	4998
Table of Allotments, FM, East Brewton, AL	4845
Table of Allotments, FM, Glencoe and Le Sueur, MN	5004
Table of Allotments, FM, Grenada, Artesia and Okolona, MS	4838
Table of Allotments, FM, Norwood, NY	5002
Table of Allotments, FM, Palmer, AK	4843
Table of Allotments, FM, Sterling City and Big Spring, TX	4834
Table of Allotments, FM, West Monroe, LA	5008
Table of Allotments, TV, Ardmore, OK	4846
Telecom*USA, Inc.	4901
Telesphere Network, Inc.	4896
Telesphere Network, Inc.	4891
Thornton, Curly	4904
Tower Broadcasting Corporation	4936
US West - Petition for Authority	4968
USA Mobile Communications, Inc. II	4879
Valley Broadcasting Company	4953
WCVQ, Inc.	4849
WTMJ, Inc.	4957
World Communications, Inc.	5065

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 7
Issue 16

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 92 - 910	4968	DA 92 -1016	4987
DA 92 - 929	4834	DA 92 -1017	4964
DA 92 - 936	4838	DA 92 -1018	4928
DA 92 - 943	4840	DA 92 -1019	5042
DA 92 - 944	5060	DA 92 -1020	4973
DA 92 - 946	4843	DA 92 -1021	5039
DA 92 - 947	4845	DA 92 -1022	5035
DA 92 - 950	5000	DA 92 -1023	5050
DA 92 - 951	4998	DA 92 -1024	4969
DA 92 - 952	5007	DA 92 -1025	5014
DA 92 - 959	5002	DA 92 -1026	5046
DA 92 - 960	5008	DA 92 -1027	5019
DA 92 - 961	5004	DA 92 -1032	4994
DA 92 - 968	4965	DA 92 -1043	4951
DA 92 - 972	4906	DA 92 -1044	4953
DA 92 - 975	4904	DA 92 -1045	4957
DA 92 - 978	4860	DA 92 -1051	4993
DA 92 - 979	4982	FCC 92 - 258	5023
DA 92 - 980	4863	FCC 92 - 289	4866
DA 92 - 981	4864	FCC 92 - 298	5065
DA 92 - 982	4865	FCC 92 - 319	4872
DA 92 - 983	4862	FCC 92 - 329	4917
DA 92 - 984	5012	FCC 92 - 330	4943
DA 92 - 985	5011	FCC 92 - 331	4923
DA 92 - 987	4885	FCC 92 - 334	4960
DA 92 - 989	4983	FCC 92 - 335	4846
DA 92 - 990	4985	FCC 92 - 336	5066
DA 92 - 991	4891	FCC 92 - 337	4936
DA 92 - 992	4911	FCC 92 - 338	4996
DA 92 - 993	4901	FCC 92 - 339	4857
DA 92 - 994	4881	FCC 92 - 342	4914
DA 92 - 995	4896	FCC 92 - 344	4905
DA 92 - 996	4879	FCC 92 - 345	4948
DA 92 - 997	4984	FCC 92 - 346	4988
DA 92 - 998	4986	FCC 92 - 348	5062
DA 92 -1009	4908	FCC 92 - 349	5054
DA 92 -1011	5009	FCC 92D - 51	4877
DA 92 -1012	4931	FCC 92R - 60	4849
DA 92 -1013	4941	FCC 92R - 61	4977
DA 92 -1014	4939	FCC 92R - 62	4856
DA 92 -1015	4937	FCC 92R - 63	4909

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 7
Issue 16

Docket Number				Page	Docket Number				Page
CC	Dkt.No.86	-	10	4969	MM	Dkt.No.89	-	178	5007
CC	Dkt.No.86	-	10	4973	MM	Dkt.No.89		406	4838
CC	Dkt.No.86	-	10	5035	MM	Dkt.No.90	-	88	5008
CC	Dkt.No.86	-	10	5039	MM	Dkt.No.90	-	298	4856
CC	Dkt.No.86	-	10	5014	MM	Dkt.No.90	-	433	4977
CC	Dkt.No.86	-	10	5042	MM	Dkt.No.90	-	566	4998
CC	Dkt.No.86	-	10	5019	MM	Dkt.No.90	-	614	4834
CC	Dkt.No.86	-	10	5046	MM	Dkt.No.91	-	71	4909
CC	Dkt.No.86	-	10	5050	MM	Dkt.No.91	-	220	5000
CC	Dkt.No.88	-	2	4964	MM	Dkt.No.91	-	312	4834
CC	Dkt.No.90	-	320	4939	MM	Dkt.No.91	-	342	4846
CC	Dkt.No.90	-	623	4964	MM	Dkt.No.91	-	348	4917
CC	Dkt.No.92	-	135	5023	MM	Dkt.No.92	-	41	4877
CC	Dkt.No.92	-	160	5066	MM	Dkt.No.92	-	58	4845
ET	Dkt.No.92	-	28	5062	MM	Dkt.No.92	-	157	4840
ET	Dkt.No.92	-	152	4872	MM	Dkt.No.92	-	158	4843
GC	Dkt.No.91	-	120	4996	MM	Dkt.No.92	-	159	4943
GEN	Dkt.No.89	-	349	4960	MM	Dkt.No.92	-	161	5004
GEN	Dkt.No.90	-	287	4908	MM	Dkt.No.92	-	162	5002
GEN	Dkt.No.90	-	413	4866	MM	Dkt.No.92	-	168	4948
GEN	Dkt.No.91	-	2	4923	MM	Dkt.No.92	-	170	4928
GEN	Dkt.No.91	-	2	5060	PR	Dkt.No.92	-	17	4914
MM	Dkt.No.88	-	352	4849	PR	Dkt.No.92	-	167	4988

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 7
Issue 16

Rulemaking Number	Page
RM - 6196	4923
RM - 6745	4838
RM - 6976	4846
RM - 6981	5008
RM - 7255	4838
RM - 7421	4998
RM - 7439	4834
RM - 7462	4840
RM - 7583	4834
RM - 7656	4998
RM - 7657	4998
RM - 7686	4834
RM - 7687	4834
RM - 7746	5000
RM - 7827	4914
RM - 7842	5000
RM - 7947	4845
RM - 8011	5004
RM - 8012	4987
RM - 8025	4843
RM - 8032	5002

Federal Communications Commission Record

Table of Cases by City
Volume 7
Issue 16

City/State	Page	City/State	Page
Abilene, TX	4936	Indianapolis, IN	4879
Amory, MS	4877	Las Vegas, NV	4953
Ardmore, OK	4846	Las Vegas, NV	4957
Artesia, MS	4838	Laughlin, NV	4909
Bayou Vista, LA	5007	Le Sueur, MN	5004
Belzoni, MS	4840	Lynchburg, VA	4928
Benavides, TX	5000	Midland, TX	4834
Big Spring, TX	4834	Newton, MS	4998
Bishop, TX	5000	Norwood, NY	5002
Burlington, VT	4849	Okolona, MS	4838
Chicago, IL	4857	Paintsville, KY	4977
Cleveland, MS	4840	Palmer, AK	4843
Coahoma, TX	4834	Petal, MS	4998
Corpus Christi, TX	4862	Red Bluff, CA	4860
Decatur, MS	4998	San Diego, CA	4951
East Brewton, AL	4845	Sebastopol, CA	4856
Glencoe, MN	5004	Sherman, TX	4846
Greensboro, NC	4906	St. Louis, MO	5065
Grenada, MS	4838	Sterling City, TX	4834
		West Monroe, LA	5008

Federal Communications Commission Record

Subject Index
Volume 7
Issue 16

Subject	Page
Adjudication	
Administrative Law Judge Decision	
Failure to prosecute	4856
Integration of ownership (qualitative), broadcast experience	4977
Integration of ownership into management	4849, 4909, 4977
Orders or Notices	
Lottery to select licensee	4928
Review Board or Commission Decision	
Reopening of record	4877
Amateur Radio Service (ARS)	
ARS - Licenses, operator	
Classes of licenses	4988
Frequency bands available to amateurs	4988
ARS - Operating requirements and procedures	
Emergency operations	4988
ARS - Transmissions and practices, prohibited	
Obscenity/indecency/profanity prohibited	4988
Broadcast Radio Services - General Rules	
Applications for authorization	
FM broadcast and FM translator stations applications: processing	4943
Licenses and permits	
Community, provisions concerning main studio in principal	4860
Initial period and renewal date	4948
Program contents	
Lottery information	4951, 4953, 4957
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	4834, 4838, 4840, 4843, 4845, 4998, 5000, 5002, 5004, 5007, 5008
Channels, availability of	4943
Distance separation requirements,reference points to determine	4917
Broadcasting - TV Stations	
Allocations/assignments/licenses	
Table of assignments	4846

FEDERAL COMMUNICATIONS COMMISSION

Subject	Page
Commission Organization	
General information - FCC	
Locations of FCC offices	5060
General public information and inspection of records	
Records not routinely available for public inspection	5062
Witholding of records from public inspection, requests for	5062
Common Carriers/Affiliates: Reports	
Overseas telecommunications traffic, reports of	4965
Communications Act of 1934	
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	4857, 4860
Radio, provisions for	
Candidates for public office, facilities for	4904
Domestic Public Fixed Radio Services	
Applications and licenses, filing requirements	
Defective applications	4905, 4906
Requirements, general application	4905, 4906
Applications and licenses, processing	
Consideration of applications, proceedings in	4905, 4906
Dismissal and return	4905, 4906
Frequency Allocations and Radio Treaty Matters	
Harmful interference, importation of devices and	
Purpose of subpart: rules concerning importation of equipment	4960
International Fixed Public Radiocommunication	
Technical considerations	
Frequencies, assignment of	5066
Practice and Procedure	
Common carriers: applications	
Signatories, those eligible to be	4879
Common carriers: complaints	
Formal or informal	4863, 4864, 4865, 4881, 4885, 4896, 4901, 4911, 4931
Parties, practitioners, witnesses	
Bar and their authority to act as representatives, members of	4996
Censure/suspension/disbarment of persons who appear before FCC	4996
Reconsideration/review of Commission action	
Reconsideration of a final FCC action, petition for	4905, 4906

FEDERAL COMMUNICATIONS COMMISSION

Subject	Page
Public Mobile Service	
Applications and licenses-filing requirements	
Filing, fees and numbers of copies	5066
Applications and licenses-processing	
Dismissal and return of application	4879
Public land mobile service	
Traffic load studies, conditions requiring	4879

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.204(b) of Act; Lawfulness of New Charges	4937
000.204(b) of Act; Lawfulness of New Charges	4939
000.204(b) of Act; Lawfulness of New Charges	4941
000.291 Delegated Authority	4984
000.291 Delegated Authority	4985
000.401 Location of Commission offices	5060
000.457 Records not routinely available for public inspectio	5062
000.459 Requests that materials or information submitted to	5062
001.023 Persons who may be admitted to practice	4996
001.024 Censure, suspension, or disbarment of attorneys	4996
001.085, Suspension of operator licenses	4994
001.106 Petitions for reconsideration	4906
001.106(a)(1) of Rules; Petitions for Reconsideration	4937
001.106(a)(1) of Rules; Petitions for Reconsideration	4939
001.106(a)(1) of Rules; Petitions for Reconsideration	4941
001.115 Application for review of action taken pursuant to	4936
001.115(a) of Rules; Applications for Review	4937
001.115(a) of Rules; Applications for Review	4939
001.115(a) of Rules; Applications for Review	4941
001.420 Additional Procedures in proceedings for amendment o	4943
001.460 Motion for Extension of Time	4987
001.711 Formal or informal complaints	4863
001.711 Formal or informal complaints	4864
001.711 Formal or informal complaints	4865
001.711 Formal or informal complaints	4881
001.711 Formal or informal complaints	4885
001.711 Formal or informal complaints	4891
001.711 Formal or informal complaints	4896
001.711 Formal or informal complaints	4901
001.711 Formal or informal complaints	4911
001.711 Formal or informal complaints	4931
001.729 Interrogatories to parties	4885
001.743. Who May Sign Applications	4879
002.1201 Purpose	4960
002.1204 Import Conditions	4960
021.013(c) Additional application information submission	4906
021.020(d) Dismissal for failure to timely submit informa	4906
021.028(d) Dismissal for failure to prosecute	4906
021.032 Consideration of applications	4906
022.006 Filing of applications, fees, and numbers of copies	5066
022.009 Standard application forms and permissive changes	5054
022.028. Dismissal and Return of Application	4879
022.516. Usage Showing for Additional Channels	4879
022.903 Cellular system service areas	5054
022.923 Content and form of Rural Service Area applications	5054
023.020 Assignment of frequencies	5066
025.111 Additional information	5066
025.115 Application for earth station authorization	5066
043.061	4965
061.038 Supporting Information to be submitted with letters	5023

063.001 Contents of Applications 5009
063.001 Contents of Applications 5011
064.703 Consumer Information 4993
073.1020 Station license period 4948
073.1125 Main Studio 4860
073.1211 Broadcast of Lottery Information 4862
073.1211 Broadcast of Lottery Information 4951
073.1211 Broadcast of Lottery Information 4953
073.1211 Broadcast of Lottery Information 4957
073.1941 Equal Opportunities 4904
073.202 FM Table of Allotments 4834
073.202 FM Table of Allotments 4838
073.202 FM Table of Allotments 4840
073.202 FM Table of Allotments 4843
073.202 FM Table of Allotments 4845
073.202 FM Table of Allotments 4998
073.202 FM Table of Allotments 5000
073.202 FM Table of Allotments 5002
073.202 FM Table of Allotments 5004
073.202 FM Table of Allotments 5007
073.202 FM Table of Allotments 5008
073.203 Availability of channels 4943
073.208 Reference points and distance computations 4917
073.3573 Processing FM broadcast station applications 4943
073.606 TV Table of Allotments 4846
074.15 Station license period 4948
090.631 Trunked systems loading, construction and authorizat 4914
095.805 Permissible Communications 4923
095.811 License requirements 4923
097.005 Station license required 4988
097.007 Control operator required 4988
097.107 Alien control operator privileges 4988
097.119 Station identification 4988
097.529 Licensing of a temporary visiting foreign amateur 4988
300.214 Extension of Lines 5009
300.214 Extension of Lines 5011
300.214 Extension of Lines 5012
300.301, License for Radio Communication or Transmission of 4994
300.310 Limitation on Holding and Transfer of Licenses 5054
300.312 Administrative Sanctions 5054
300.315 Facilities for candidates for public office 4904
300.503 Forfeitures in cases of rebates and offsets 5054
300.503(b) Forfeiture 4860
300.503(b) Forfeitures (Notice of Apparent Liability) 4857
400.181304 Broadcasting Lottery Information 4862
400.181304 Broadcasting Lottery Information 4951
400.181304 Broadcasting Lottery Information 4953
400.181304 Broadcasting Lottery Information 4957
400.181464 Broadcasting Obscene or Indecent Language 4857
47 C.F.R. Section 0.291 Delegated Authority 4968
47 CFR § 64.702 Furnishing of Enhanced Services & CPE 4964
47 CFR § 69 4969
47 CFR § 69 4973
47 CFR § 69 5014

47 CFR § 69 5019
47 CFR § 69 5035
47 CFR § 69 5039
47 CFR § 69 5042
47 CFR § 69 5046
47 CFR § 69 5050
500.100 HDO 4928
500.2110 Failure to Prosecute 4877
500.3010 Integration of Ownership (Qualitative), Broadcast E 4977
500.3035 Integration of Ownership into Management, Quantitat 4849
500.3035 Integration of Ownership into Management, Quantitat 4909
500.3040 Integration of Ownership Into Management, Questions 4977
500.3065 Comparative Coverage 4849
500.3110 Failure to Prosecute 4856
DA92-998; AAD92-66 4986
Part 15 Radio Frequency Devices 4866
Part 15 Radio Frequency Devices 4872
Regard Study Area Part 36; Sect. 036.125(f); 036.154(e)(1)&(..... 4986
Section 001.773 Petitions Against New Tariff Filings 4983

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of	**MM Docket No. 90-614**
Section 73.202(b),	RM-7439
Table of Allotments,	RM-7686
FM Broadcast Stations.	RM-7687
(Big Spring, Sterling City and Coahoma, Texas)[1]	

In the Matter of

Amendment of	**MM Docket No. 91-312**
Section 73.202(b),	RM-7583
Table of Allotments,	
FM Broadcast Stations.	
(Midland and Big Spring, Texas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 10, 1992; **Released: July 28, 1992**

By the Chief, Allocations Branch:

1. The Commission has before it two inter-related proceedings concerning FM allotments at Big Spring, Sterling City and Midland, Texas. The Commission issued a *Notice of Proposed Rule Making* (MM Docket No. 90-614), 5 FCC Rcd 7568 (1990), in response to a petition by Ballard Broadcasting Company of Oklahoma, Inc. ("Ballard"). The deadline for filing comments expired on February 7, 1991. We also issued a *Notice of Proposed Rule Making* in MM Docket No. 91-312, 6 FCC Rcd 6086 (1991), in response to a petition filed by Three Card Enterprises ("Three Card") on November 21, 1990. We issued the latter *Notice* without realizing that Three Card's and Ballard's proposal were mutually exclusive. Had we been aware of the conflict, we would have considered both petitions in one proceeding. In order to rectify our error, we are consolidating these two proceedings for consideration.

2. By *Notice of Proposed Rule Making* in MM Docket No. 90-614, the Commission proposed, at the request of Ballard, the allotment of Channel 243C3 to Big Spring, Texas, as the community's second local FM service (RM-7439). Ballard filed comments stating its intention to apply for Channel 243C3, if allotted. Mark C. Nolte ("Nolte") and David W. Wrinkle, d/b/a KBST-FM Radio, ("KBST") filed counterproposals.[2] Ballard and Nolte filed reply comments.[3] KBST filed further comments.[4] Nolte filed a late-filed response to comments and counterproposals.[5]

3. By *Notice of Proposed Rule Making* in MM Docket No. 91-312, the Commission, at the request of Three Card, permittee of Station KQRX-FM, Channel 236A, Midland, Texas, proposed the substitution of Channel 236C3 for Channel 236A at Midland, Texas, and the modification of Station KQRX-FM's authorization reflecting the higher powered channel, along with the concomitant substitution of Channel 239A for Channel 237A at Big Spring, Texas, and the modification of Station KBST-FM's license accordingly (RM-7583). To accommodate the upgrade at Midland, an *Order to Show Cause* was issued to David W. Wrinkle, licensee of Station KBST-FM, as to why his license should not be modified to specify operation on Channel 239A in lieu of its present Channel 237A at Big Spring, Texas. Three Card filed comments reiterating its intention to apply for Channel 236C3 at Midland and to reimburse David Wrinkle for all reasonable expenses incurred in changing his frequency to Channel 239A.[6] KBST, filed a counterproposal.[7] Three Card filed reply comments.

THE PLEADINGS

4. *MM Docket No. 90-614 (Big Spring and Sterling, Texas).* Nolte, in his counterproposal, proposes the allotment of Channel 243C2 to Sterling City, Texas, as that community's first local service. Nolte's proposal is mutually exclusive with Ballard's proposal to allot Channel 243C3 to Big Spring. In support of his proposal, Nolte states that Ster-

[1] The communities of Sterling City and Coahoma, Texas have been added to the caption.

[2] Public Notice of these counterproposals was given March 27, 1990 (Report No. 1842). Nolte requested the allotment of Channel 243C2 to Sterling City, Texas (RM-7686). KBST requested to substitution of Channel 240C3 for Channel 237A at Big Spring, Texas, and the modification of the authorization for Station KBST-FM, Channel 237A, Big Spring, accordingly. To accommodate Ballard's proposal, KBST also proposed allotting Channel 232C3 to Big Spring, Texas, along with the concomitant substitution of Channel 288A for Channel 232A at Coahoma, Texas.

[3] Nolte's reply comments restated his intention to apply for Channel 243C2 at Sterling City, if allotted.

[4] KBST filed a motion to accept the further comments, as they were untimely filed. Ballard objected, stating good cause has not been shown for submitting the further comments. Ordinarily, in a contested proceeding, we would not accept late filed comments. Inasmuch, as the late-filed comments pertain, in part, to providing an alternate allotment scheme, we believe that the public interest would be served by accepting KBST's late-filed reply comments since they facilitate resolution of this proceeding.

[5] Nolte filed late-filed comments addressing an allegation by Ballard that Nolte works as a consultant for Station KBST-FM. Nolte's responsive comments were late-filed, and were not accompanied by a request for their acceptance. Therefore, Nolte's comments will not be considered.

[6] Three Card acknowledged that KBST filed a counterproposal in MM Docket No. 90-614, requesting the upgrade of Station KBST-FM's facilities to Class C3 status. Three Card states that should that counterproposal be adopted, it will not reimburse the licensee of Station KBST-FM for its expenses.

[7] KBST's counterproposal, which requested the substitution of Channel 239C3 for Channel 237A at Big Spring, was unacceptable for consideration and therefore was not placed on public notice. KBST's counterproposal was short-spaced to its own counterproposal in MM Docket No. 90-614 to substitute Channel 240C3 for Channel 237A at Big Spring.

ling City is an incorporated community and seat of Sterling County, and meets all of the criteria required of a community for allotment purposes. Nolte submits that the allotment of Channel 243C2 to Sterling City would serve a larger population than Ballard's Big Spring upgrade. Nolte asserts that Channel 243C2 at Sterling City will serve an area of 8,495 square kilometers with a population of 85,896, while Channel 243C3 at Big Spring would serve an area of 4,783 square kilometers with a population of 38,024.

5. KBST's counterproposal requests the substitution of Channel 240C3 for Channel 237A at Big Spring and the modification of Station KBST-FM's license to specify operation on the higher powered channel. KBST requests relocation of Station KBST-FM site to a point 3 kilometers (1.88 miles) east of the current location of the station transmitter site. KBST states it will apply for Channel 240C3, if allotted. Further, KBST offers an alternative proposal that would provide a second Class C3 allotment to Big Spring. Specifically, it notes that Channel 232C3 could be allotted to Big Spring if Channel 288A was substituted for Channel 232A at Coahoma, Texas.

6. In response to the counterproposals, Ballard alleges that Nolte is a consultant who works for KBST. Ballard also states that KBST's counterproposal should be rejected because it did not include any engineering statement to support its proposal. Furthermore, Ballard argues that KBST's proposal is an untimely filed counterproposal to MM Docket No. 90-339, which proposed the allotment of Channel 232A to Coahoma.[8] However, Ballard adds that KBST's proposal could be accommodated by alloting Channel 239C3 to Big Spring for Station KBST-FM with a site restriction of 8.7 kilometers (5.4 miles). Ballard argues that since there is no high ground or mountains close to Big Spring, the additional site restriction could be imposed.

7. Ballard states that Nolte's counterproposal to add a channel to Sterling City is "odd" in view of the "minuscule" 1990 population of 915 persons in the city and 1,204 in the county. Ballard states that since there is a large overlap between its proposal and Nolte's counterproposal, the Commission's "quiet village" doctrine should apply in this case, citing *Ruarch Associates*, 101 F.C.C. 2d 1358 (1985), and *Beacon Broadcasting*, 2 FCC Rcd 3469, (1987). Ballard contends that based on the small population in the city and county, Sterling City cannot be accorded the presumption of the need for a first transmission service. In any event, Ballard asserts that Nolte's counterpropoosal can be accommodated by allotting Channel 282C2 to Sterling City.

8. KBST, in its late-filed comments, states it did not counsel Nolte to prepare, nor did it assist in the preparation of, Notle's counterproposal. KBST also states that due to a clerical error, it inadvertently omitted the engineering statement to accompany its counterproposal. KBST notes that although missing an engineering statement, its counterproposal adequately referenced the technical aspects of its proposal. Furthermore, KBST argues that no one has argued that the omission has resulted in prejudice to any other interested party to the proceeding. In response to Ballard's claim that KBST's proposal should be considered as a untimely filed counterproposal in the Coahoma, Texas, proceeding, KBST states its proposed upgrade did not conflict with the proposed Coahoma allotment. KBST notes that the Commission may, in any proceeding, allot a comparable channel rather than the channel first petitioned for or proposed if that substitution will remove a conflict with other proceedings, citing *Amendment of Section 73.202(b) Table of Allotments (Pinewood, South Carolina)*, 5 FCC Rcd 7609 (1990). KBST states that Ballard's proposal to allot Channel 239C3 instead of Channel 240C3 for Station KBST-FM would involve an onerus site restriction. KBST notes the allotment of Channel 240C3 would only require a 3 kilometers (1.8 mile) transmitter site move for Station KBST-FM, whereby Ballard's solution would require a move of 10.6 kilometers (6.6 miles), thereby preventing Station KBST-FM's transmitter from remaining in the general vicinity of its present site along a ridge which represents the highest ground in the area. Furthermore, KBST contends its proposal to accommodate Ballard by allotting Channel 232C3 to Big Spring instead of Channel 243C3 is less site restrictive than Ballard's own proposal.

9. *MM Docket No. 91-312 (Midland and Big Spring, Texas)*. Three Card proposes the substitution of Channel 236C3 for Channel 236A at Midland. To accommodate the substitution, it also proposes the substitution of Channel 239A for Channel 237A at Big Spring. The Big Spring substitution is short-spaced to KBST's proposal to substitute Channel 240C3 for Channel 237A at Big Spring.

DISCUSSION

10. We have carefully considered all of the pleadings before us. Based on the information provided to us, we believe that each of the petitioners has shown that the public interest would be served by a grant of their requests. Contrary to Ballard's assertions, we find that Sterling City is a community for allotment purposes. According to the 1990 U.S. Census, Sterling City is an incorporated community and has a population of 1,096 persons.

11. We reject Ballard's arguement that KBST's counterproposal should be rejected because it did not include any engineering statement to support its proposal. While petitioners risk dismissal of their petitions due to lack of technical documentation, we found KBST provided enough information to confirm its technical integrity. Furthermore, acceptance of KBST's counterproposal created no adverse impact on other pending proposals in this proceeding, since all parties can be accommodated.[9] Finally, we find that Ballard has not presented sufficient evidence to indicate collaboration between Nolte and KBST in filing their counterproposals.[10]

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[8] Subsequently the Commission issued a *Report and Order* in MM Docket No. 90-339, 6 FCC Rcd 6083 (1991), providing for the allotment of Channel 232A to Coahoma, Texas.

[9] However, we expect petitioners to submit, at a minimum, an engineering statement designating exact site coordinates and demonstrating compliance with all relevant domestic and international minimum spacing requirements. Failure to do so may result in dismissal of the petiton.

[10] In any event, if a party wishes to raise misconduct allegations addressed to a party participating in an allotment rule making, it may do so, in a Petition to Deny an application to transfer control of a licensee or through other appropriate

12. Our engineering analysis has determined that each of the allotment requests can be accommodated in compliance with the Commission's minimum distance separation requirements. Therefore, we will not comparatively consider the proposals.[11] We believe the public interest would be served by alloting Channel 232C3 to Big Spring; and Channel 243C2 to Sterling City; and by substituting Channel 240C3 for Channel 237A at Big Spring and Channel 236C3 for Channel 236A at Midland. This action will provide expanded services at Midland and Big Spring, a first local FM service at Sterling City, and a second local FM service to Big Spring. Channel 232C3 can be allotted to Big Spring, Texas, without the imposition of a site restriction.[12] As noted above, the allotment of Channel 232C3 to Big Spring requires the substitution of Channel 288A for vacant and unoccupied for Channel 232A at Coahoma, Texas.[13] Channel 240C3 can be substituted for Channel 237A at Big Spring with a site restriction of 3.1 kilometers (1.9 miles) northeast.[14] Channel 236C3 can be allotted to Midland with a site restriction of 8.4 kilometers (5.2 miles) west to accommodate Three Card's desired transmitter site.[15] Channel 243C2 can be allotted to Sterling City with a site restriction of 14.3 kilometers (8.9 miles) southwest to avoid a short-spacing to Station KXOX-FM, Channel 244A, Sweetwater, Texas.[16] Mexican concurrence in each of the allotments has been received because all of the communities are located within 320 kilometers (199 miles) of the U.S.-Mexican border. As proposed, we will also modify Station KBST-FM and Station KQRX-FM's authorizations to specify operation on Channel 240C3 and 236C3, respectively, in accordance with Section 1.420(g) of the Commission's Rules. Since KBST will receive its upgrade, Three Card will not be required to reimburse KBST for expenses associated with the channel change.

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 11, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Big Spring, Texas	232C3, 240C3
Coahoma, Texas	288A
Midland, Texas	222C, 227C1, 236C3, 277C1 294C1
Sterling City, Texas	243C2

14. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of David W. Wrinkle for Station KBST-FM, Big Spring, Texas, IS MODIFIED to specify operation on Channel 240C3, in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

15. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Three Card Enterprises for Station KQRX-FM, Midland, Texas, IS MODIFIED to specify operation on Channel 236C3, in lieu of Channel 236A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

16. The window period for filing applications for Channel 243C2 at Sterling City, Texas, and Channel 232C3 at Big Spring, Texas, will open on **September 14, 1992,** and close on **October 14, 1992.**

17. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or

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means, *e.g.*, the filing of a complaint, a motion to revoke the station's license, or an objection to an application. *See Monterey, Tennessee and Monticello, Kentucky*, 7 FCC Rcd 1606 (1992).

[11] Since we need not comparatively consider these proceedings, we will not address the "quiet village" issue raised by Ballard.

[12] The coordinates for Channel 232C3 at Big Spring are North Latitude 32-15-00 and West Longitude 101-28-24.

[13] The coordinates for Channel 288A at Coahoma are North Latitude 32-17-36 and West Longitude 101-18-18.

[14] The coordinates for Channel 240C3 at Big Spring for Station KBST-FM are North Latitude 32-16-07 and West Longitude 101-26-57.

[15] The coordinates for Channel 236C3 at Midland are North Latitude 32-00-00 and West Longitude 102-10-00.

[16] The coordinates for Channel 243C2 at Sterling City are North Latitude 31-44-08 and West Longitude 101-05-06. Nolte's proposed coordinates North Latitude 31-37-03 and West Longitude 100-51-34, with a site restriction of 27.3 kilometers (17.0 miles) southeast. However, the Commission generally does not protect a prospective applicant's desired transmitter site for a new allotment if a less restrictive site is available, as there is no guarantee that the petitioner will ultimately become the licensee. Therefore, we will not consider Nolte's site, and instead adopt a less restrictive site for the allotment of Channel 243C2 at Sterling City, Texas.

upgrade. As a result of this proceeding, Three Card Enterprises, permittee of Station KQRX-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

18. IT IS FURTHER ORDERED, That the petition for Rule Making filed by David W. Wrinkle seeking the substitution of Channel 239C3 for Channel 237A at Big Spring, Texas, IS DISMISSED.

19. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

20. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-406

In the Matter of

Amendment of Section 73.202(b),	RM-6745
Table of Allotments,	RM-7255
FM Broadcast Stations.	
(Grenada, Artesia and Okolona,	
Mississippi)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 13, 1992; Released: July 28, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration of the *Report and Order* (*"R&O"*), 7 FCC Rcd 56 (1992), filed by Tenn-Tom Broadcasting Corp. ("Tenn-Tom"), licensee of Station WWZQ-FM, Channel 287A, Aberdeen, Mississippi. Tenn-Tom also filed a motion for stay of the Okolona filing window, two supplements to its petition for reconsideration and further comments.[1] Charisma Communications Company ("Charisma") filed comments in support of the petition for reconsideration withdrawing its intention to apply for Channel 289A in Okolona, Mississippi.[2] Chatterbox Inc., licensee of Station WQXB(FM), Channel 261C2, Grenada, Mississippi, filed a motion to sever the Grenada and Artesia upgrades from this proceeding.[3]

2. The *R&O* substituted FM Channel 261C2 for Channel 261A at Grenada, Mississippi, substituted Channel 260C2 for Channel 261A at Artesia, Mississippi and allotted Channel 289A to Okolona, Mississippi. The reference coordinates for the Okolona allotment were mutually exclusive with those specified in Tenn-Tom's application for a construction permit to upgrade the facilities of WWZQ-FM on Channel 287C3 at Aberdeen (File No. BPH-9005161B). Pursuant to the Commission's policy set forth in *Andalusia, Alabama*, 49 FR 32201 (1984), we determined that the public interest would be better served by granting the proposals involving Grenada, Artesia and Okolona than by protecting the Aberdeen application site.

3. Tenn-Tom filed a petition for reconsideration requesting that the reference coordinates for the Okolona allotment be changed to avoid the short-spacing to its application for the Station WWZQ-FM upgrade. Tenn-Tom provided alternate coordinates for the allotment. It also requested that the reference coordinates for the Channel 287C3 allotment at Aberdeen be changed, alleging that its current reference coordinates are not available for use as a transmitter site. In further comments, Tenn-Tom states that since the sole expression of interest in the Okolona allotment has been withdrawn, the channel can be deleted.

4. *Discussion.* We believe that Tenn-Tom's petition for reconsideration should be granted in part and denied in part. We will delete Channel 289A from Okolona. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted, and absent such an expression of interest, it is our policy to refrain from allotting the channel. Here, the sole interest in the channel has been withdrawn. No other party has expressed an interest in the allotment and no applications have been filed.[4] Therefore, we will delete Channel 289A from Okolona as requested.

5. We will not, however, grant Tenn-Tom's request to modify the reference coordinates for Channel 287C3 at Okolona to specify the coordinates stated in its application. Our policy is not to change reference coordinates outside of a rule making proceeding, or to initiate a proceeding solely to change reference coordinates. The Commission adopted this policy to protect the integrity of the FM Table of Allotments. In this instance, the allotment at Aberdeen was not considered as part of the rule making proceeding. To consider Tenn-Tom's request at this point in the proceeding would constitute acceptance of an untimely counterproposal. In any event, Tenn-Tom has failed to demonstrate a compelling reason why its coordinates must be changed. Therefore, we will not change the reference coordinates for Aberdeen.

6. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 11, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

Community	Channel No.
Okolona, Mississippi	---

7. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Tenn-Tom Broadcasting Corp., IS GRANTED to the extent indicated above and IS DENIED in all other respects.

8. IT IS FURTHER ORDERED, That the Motion To Sever the communities of Grenada and Artesia, Mississippi from this proceeding, filed by Chatterbox, Inc. IS DISMISSED AS MOOT.

9. IT FURTHER ORDERED, That this proceeding IS TERMINATED.

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[1] The termination of this proceeding renders the motion for stay of the filing window moot.

The further comments and supplements were late-filed. However, since this proceeding is uncontested and no one will be prejudiced by acceptance, we will consider these comments.

[2] In accordance with Section 1.420(j) of the Commission's Rules, Charisma states that it did not receive any consideration in exchange for withdrawing its expression of interest.

[3] This request is moot, given our actions herein.

[4] The filing window for the Okolona allotment closed March 25, 1992.

10. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-157

In the Matter of

Amendment of Section 73.202(b), RM-7462
Table of Allotments,
FM Broadcast Stations.
(Cleveland and Belzoni,
Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 13, 1992; Released: July 28, 1992

Comment Date: September 18, 1992
Reply Comment Date: October 5, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Larry G. Fuss, d/b/a Contemporary Communications ("petitioner"), former licensee of WQAZ(FM) (now WDTL-FM), Cleveland, Mississippi, and successor in interest to Robert G. Johnston, Trustee, requesting the substitution of FM Channel 225C2 for Channel 224A at Cleveland and the modification of the license of Station WQAZ(FM) to specify operation on the higher class channel.[1] To accommodate the Cleveland channel substitution, petitioner proposes the substitution of Channel 292A for Channel 225A at Belzoni, Mississippi, and the modification of the construction permit of Larry R. Scott ("Scott"), permittee for WJSJ(FM), Channel 225A, Belzoni, accordingly. Petitioner states his intention to apply for the channel, if allotted.[2]

2. In recognition of the Commission's policy concerning the involuntary relocation of an authorized transmitter, petitioner provided a copy of an agreement with Scott consenting to a change in its authorized transmitter site, as well as its proposed channel of operation, to accommodate the modification for Station WQAZ(FM).

3. We believe the public would be served by proposing the substitution of Channel 225C2 for Channel 224A at Cleveland, Mississippi since it would provide the community with a wide coverage area FM service. Channel 225C2 can be allotted to Cleveland in compliance with the Commission's minimum distance separation requirements at the petitioner's current site.[3] Channel 292A can be substituted for Channel 225A at Belzoni, Mississippi in compliance with the minimum distance separation requirements with a site restriction 8.4 kilometers (5.2 miles) southeast.[4] As requested, we also propose to modify petitioner's license for Station WDTL-FM to specify operation on Channel 225C2 at Cleveland. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 225C2 at Cleveland or require petitioner to demonstrate the availability of an additional equivalent class channel. In addition, we shall propose to modify the construction permit for Channel 225A, Belzoni, Mississippi (FCC File No. BPH-870327KD) issued to Larry R. Scott to accommodate the Cleveland, Mississippi proposal.

4. Whenever an existing licensee or permittee is ordered to change frequencies in order to accommodate a new channel allotment, Commission policy requires the benefitting party to reimburse the affected station for costs incurred therewith. In this instance, petitioner stated its willingness to prepare the engineering exhibit for the minor change application made necessary by the channel modification to specify the new site at no charge to Scott.

5. Although an *Order to Show Cause* to Scott for the proposed station on Channel 225A, Belzoni, Mississippi, is not required in view of its consent to Scott's modification request, we will serve Scott with a copy of this *Notice*.

6. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Cleveland, Mississippi	224A, 280A, 295A	225C2, 280A, 295A
Belzoni, Mississippi	225A, 296A	292A, 296A

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following: Larry R. Scott, 1605 Carlisle Drive, E., Mobile, AL 36618, and Delta Radio, Inc. P.O. Box 159, Fayetteville, GA 30214.

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

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[1] An assignment of license for Station WQAZ(FM) to Delta Radio, Inc. was consummated on March 18, 1992 (BALH-9020212HC). We will serve Delta Radio with a copy of this *Notice*.

[2] The instant petition was initially rejected as defective based upon a grant of Scott's application for construction permit on Channel 225A at Belzoni, Mississippi. *See Letter* to Larry G. Fuss from Assistant Chief, Policy and Rules Division, October 18, 1990. Petitioner filed a petition for reconsideration of that action. We will treat petitioner's petition for reconsideration as a petition for rule making.

[3] The coordinates for Channel 225C2 at Cleveland are North Latitude 33-45-12 and West Longitude 90-42-45.

[4] The coordinates for 292A at Belzoni are North Latitude 33-08-06 and West Longitude 90-24-58.

9. Interested parties may file comments on or before **September 18, 1992** and reply comments on or before **October 5, 1992** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner and its counsel as follows:

Barbara L. Waite, Esq.
Venable, Baetjer, Howard & Civiletti
1201 New York Ave., N.W., Suite 1000
Washington, D.C. 20005

Delta Radio, Inc.
P.O. Box 159
Fayetteville, GA 30214.

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-158

In the Matter of

Amendment of Section 73.202(b), RM-8025
Table of Allotments,
FM Broadcast Stations.
(Palmer, Alaska)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 14, 1992; Released: July 28, 1992

Comment Date: September 18, 1992
Reply Comment Date: October 5, 1992

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Pioneer Broadcasting Company, Inc. ("petitioner"), licensee of Station KWHL(FM), Anchorage, Alaska, seeking the substitution of Channel 238C1 for vacant Channel 239C1 at Palmer, Alaska.[1]

2. In support of the proposal petitioner states that the requested substitution of Channel 238C1 at Palmer is required to accommodate its application to relocate the transmitter for Station KWHL(FM) and to upgrade its facilities to full Class C status.[2] Petitioner advises that its pending application for Channel 293C at Anchorage[3] is short-spaced to Channel 239C1 at Palmer.[4] Moreover, petitioner asserts that it is constrained in site alternatives due to the scarcity of area transmitter sites that would provide protection to other spectrum users, such as the Commission's monitoring station in Anchorage, as well as the ILS facilities at Elmdorf Air Force Base. Petitioner claims that unless it can relocate to its preferred site, Station KWHL(FM) will be precluded from retaining a Class C status.

3. In view of the above, we believe the public interest would be served by substituting Channel 238C1 for Channel 239C1 at Palmer, as requested, since it could enable Station KWHL(FM) to expand its coverage area at Anchorage. Channel 238C1 can be allotted to Palmer consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, without the imposition of a site restriction.[5]

4. In view of the above, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Palmer, Alaska	239C1	238C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 18, 1992,** and reply comments on or before **October 5, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Paul J. Berman, Esq.
Francis R. Hawkins, Jr., Esq.
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed

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[1] The construction permit issued to Valley Broadcasting Co., Inc. for Station KUZN(FM) on Channel 239C1 at Palmer (File No. BPH-850228MF), was dismissed by letter on June 10, 1991. Therefore, a new filing window will be opened for the channel at Palmer upon the termination of this proceeding.

[2] Since Station KWHL's currently licensed facilities (100 kilowatts at -27 meters HAAT) is less than the minimum now required for retention of Class C status, it is subject to a reclassification. *See Public Notice*, March 24, 1987, *Reclassification of FM Facilities Pursuant to BC Docket No. 80-90*, 2 FCC Rcd 2124 (1987). Petitioner's pending modification application for Station KWHL(FM) (File No. BPH-870227MI) (specifying 100 kilowatts at 311 meters HAAT), is designed to conform with the Commission's reclassification policy.

[3] Coordinates at the petitioner's preferred site at Anchorage are 61-20-10 and 149-30-46.

[4] Petitioner's preferred site is 35.3 kilometers from Channel 239C1 at Palmer, at coordinates 61-38-39 and 149-21-34, whereas a distance of 41 kilometers is required.

[5] Coordinates used for Channel 238C1 at Palmer are 61-36-00 and 149-06-30.

Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-58

In the Matter of

Amendment of Section 73.202(b),	RM-7947
Table of Allotments,	
FM Broadcast Stations.	
(East Brewton, Alabama)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 15, 1992; Released: July 28, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 2190 (1992), issued in response to a petition filed on behalf of Escambia Creek Indian Broadcasting Company ("petitioner") proposing the allotment of Channel 239A to East Brewton, Alabama, as that community's first local aural transmission service. Petitioner filed comments in support of the proposal reiterating its intention to apply for Channel 239A if allotted to East Brewton. No other comments were received.

2. We believe the public interest would be served by allotting Channel 239A to East Brewton since it could provide a first local aural transmission service to the community. As indicated in the *Notice*, Channel 239A can be allotted to East Brewton in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 12.0 kilometers (7.4 miles) north of the community.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 11, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
East Brewton, Alabama	239A

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. The window period for filing applications on Channel 239A at East Brewton, Alabama, will open on **September 14, 1992,** and close on **October 14, 1992.**

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates used for Channel 239A are 31-12-07 and 87-02-03. The site restriction is required to avoid a short-spacing to the licensed site of Station WAVH(FM), Channel 241C, Mobile, Alabama, at coordinates 30-41-20 and 87-49-49, as well as to the authorized site of Station WKNU(FM), Channel 292A, Brewton, Alabama, at coordinates 31-06-45 and 87-01-19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-342

In the Matter of

Amendment of Section 73.606(b), RM-6976
Table of Allotments,
Television Broadcast Stations.
(Ardmore, Oklahoma and
Sherman, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 17, 1992; Released: July 28, 1992

By the Commission:

1. At the request of K-Twelve, Ltd. ("K-Twelve"), licensee of Station KXII(TV), Channel 12, Ardmore, Oklahoma, the Commission has before it the *Notice of Proposed Rule Making* (*"Notice"*), 6 FCC Rcd 7006 (MM Bur. 1991), proposing the reallotment of Channel 12 from Ardmore, Oklahoma to Sherman, Texas, and the modification of K-Twelve's authorization accordingly, pursuant to Commission Rule 1.420(i). No change in technical facilities is proposed or contemplated. K-Twelve filed comments in support of the *Notice*. No other comments were received.[1]

2. *Background*. In the *Notice*, the Bureau stated that while K-Twelve's proposal would remove the sole local commercial television transmission station from Ardmore, it would provide a first operational local commercial television transmission station to the larger community of Sherman. The Bureau noted that since K-Twelve did not intend to move its transmitter site from its present location, Ardmore would, as a practical matter, continue to receive the same level of reception service from Station KXII(TV) as it currently enjoys.

3. The Bureau specifically requested K-Twelve to respond to several concerns. First, the Bureau noted that the Commission generally restricts the removal of a community's sole local broadcast service, citing the *Community of License MO&O*. The Bureau also stated that the public interest is generally not served by removing a community's sole local transmission service merely to provide a first local transmission service to another community. Therefore, K-Twelve was requested to demonstrate how the public interest would be served by removing the only operating channel in Ardmore to provide a first local transmission service in Sherman. Second, the Bureau noted that the Commission will not consider the degree of technical service a licensee proposes to maintain to its original community of license as a factor in a decision to grant a change in community of license, lest we be required to ensure that coverage is provided to the original community in perpetuity.[2] Third, the Bureau, noting that no change in the station's technical parameters appeared possible, requested comment as to any possible disruption that would result from removal of Ardmore's only local service. Finally, K-Twelve was asked to provide any additional information as to the overall public interest benefits that would flow from its proposal.

4. *Comments*. K-Twelve argues that this change would result in a preferential arrangement of allotments. If each community was compared for the allotment of a VHF television channel, assuming that neither community had a television allotment,[3] Sherman would be the preferred community since it is larger, and more important to the surrounding region, than Ardmore. K-Twelve claims that according to a 1989 Arbitron study, there are 17,900 television households in Carter County, in which Ardmore is located, compared to 37,600 television households in Grayson County, in which Sherman is located.[4] K-Twelve also notes that Sherman has more major employers than Ardmore; that the total payroll of Sherman is larger than that of Ardmore; that Sherman has two colleges, whereas Ardmore has none; that Sherman has more bank deposits than Ardmore; and that Sherman has more gross retail sales than Ardmore.

5. K-Twelve states that it will continue to operate Channel 12 from its current site, thereby continuing to provide both Ardmore and Sherman with city grade service. K-Twelve submits an engineering analysis indicating that there is no new transmitter site that can be selected consistent with spacing requirements that would remove city grade service from Ardmore. As for its programming, K-

[1] K-Twelve's petition for rule making was initially dismissed by letter on the grounds that the proposal would not result in a preferred distribution of facilities under our allotment priorities and policies. The letter noted that the change in community would remove Ardmore's only local transmission service. *See* Letter from Chief, Allocations Branch, to counsel for K-Twelve, Ltd. (February 1, 1990). K-Twelve filed an application for review of the letter dismissal and again requested the initiation of a rule making proceeding.

While K-Twelve's application for review was pending, the Commission adopted an order stating that waivers of the prohibition on removal of a community's only local transmission service would be considered in conjunction with petitions to change community of license. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License* (*Memorandum Opinion and Order*) (*"Community of License MO&O"*), 5 FCC Rcd 7094, 7096 (1990). Pursuant to that decision, the staff subsequently sought comments regarding K-Twelve's proposal through the *Notice*. As a result, we will dismiss K-Twelve's application for review as moot.

[2] *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License* (*Report and Order*) (*"Community of License R&O"*), 4 FCC Rcd 4870, 4873 (1989).

[3] There are two vacant noncommercial UHF allotments in Ardmore. In Sherman, there are two vacant UHF allotments, one commercial and one noncommercial.

[4] The 1990 U.S. Census lists Ardmore's population as 23,079 persons and Sherman's as 31,601 persons.

Twelve intends to operate Station KXII(TV) "in a manner similar to the station's operation over the past 33 years," continuing its attention to local news and public affairs within its market. K-Twelve notes that since 1966 Station KXII(TV) has operated with its main studio and offices within the city limits of Sherman, and with a studio in Ardmore, with the Commission's approval.

6. K-Twelve states that there will be no disruption of existing reception service to Ardmore. It notes that marketplace competition mandates continuing local service to, and response to, the needs and interests of Ardmore. K-Twelve includes an affidavit from its general partner stating that the station's studio in Ardmore, which includes equipment for the production of local programming, will continue to be operated as it has in the past.[5] K-Twelve further notes that viewer loyalty is necessary to maintain Ardmore in Station KXII(TV)'s ADI. K-Twelve states that while Ardmore receives city grade and Grade A television service from both Station KXII(TV) and Station KTEN-TV, Channel 10, Ada, Oklahoma, Sherman receives no city grade or Grade A signal from any station other than KXII(TV).

7. Finally, K-Twelve contends that the reallotment would be a significant factor in the station's economic survival. K-Twelve contends that the additional competitive forces brought by cable threaten to reduce revenue to such a degree that the present level of operation may be severely cut, thereby depriving those without cable of the station's over-the-air television programming. It argues that should the Commission relicense Station KXII(TV) to Sherman, Grayson County, Texas, will for the first time be credited to Station KXII(TV)'s "Area of Dominant Influence" (ADI), thereby increasing Station KXII(TV)'s market from the 178th largest ADI to the 157th largest ADI. As a result, Station KXII(TV) may be more easily able to provide its advertisers with an audience measurement in Sherman/Grayson County.

8. *Discussion.* We believe the public interest would be served by reallotting Channel 12 from Ardmore to Sherman, Texas, and by modifying Station KXII(TV)'s license to specify operation on Channel 12 in Sherman, in order to provide the more populous community of Sherman with its first local transmission service. Although this action will deprive Ardmore of its only operating local transmission service, and we have concluded that such actions are generally undesirable due to the disruption to existing service they cause, we find that there are circumstances present in this case that will minimize any such concerns.

9. Since K-Twelve currently places a city grade signal over both Sherman and Ardmore, it need not change its transmitter site to effectuate this change in community. Indeed, K-Twelve claims, and our engineering analysis has confirmed, that spacing constraints currently preclude moving the transmitter site for Station KXII(TV) in such a way that Ardmore would no longer be within the city grade contour of the station. Therefore, we do not foresee any disruption in the current level of reception service of Station KXII(TV) to Ardmore and surrounding areas. We note that we have previously stated that we will not accept continued reception service coverage as a factor in favor of a licensee seeking to change its community of license, as this would require ensuring that the coverage was provided to the original community in perpetuity, lest the licensee avoid one of the terms of its promise that allowed the move. *See Community of License R&O,* 4 FCC Rcd at 4873. In this instance, however, our technical requirements and current spectrum usage constrain any significant movement of Station KXII(TV).

10. K-Twelve has operated its main studio in Sherman, with the Commission's approval, for over twenty years. Therefore, as a practical matter, the residents of Ardmore should not be deprived of any current level of service as a result of this change. We note that K-Twelve has pledged to continue operation of its Ardmore studio at current levels, and argues that maintaining such service to Ardmore is necessary to maintain viewership in the area. The probability that K-Twelve will continue to operate a studio in Ardmore further reduces any adverse effect that this change in community would have on Ardmore residents.

11. While we see little risk that the level of service to Ardmore would be diminished by grant of this proposal, we believe there may be benefits in recognizing Station KXII(TV)'s bonds with the city of Sherman. As K-Twelve notes, Station KXII(TV) is the only station providing Grade A or better service to Sherman, and has sought to address the needs of Sherman, for example, through its studio location, over the years. Given the size and importance of the community of Sherman, we believe formal recognition of this relationship is warranted. Furthermore, because this action properly reflects allotment policy, it is in the public interest as well that the station's audience in Grayson County be reflected in its market, to the extent that is consistent with the policies and processes of ratings organizations.

12. Channel 12 can be allotted to Sherman, Texas, in compliance with the Commission's minimum distance separation requirements at the current transmitter site for Station KXII(TV).[6] In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will modify the license for Station KXII(TV) to specify Sherman, Texas, as its community of license on Channel 12, in lieu of Ardmore, Oklahoma.

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 10, 1992,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Ardmore, Oklahoma	*17, *28-
Sherman, Texas	12-, 20, *26-

14. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KXII(TV), Ardmore, Oklahoma, IS MODIFIED to specify

[5] The general partner also pledges not to seek a change in Station KXII(TV)'s transmitter site.

[6] The coordinates for Channel 12 at Sherman, Texas are North Latitude 34-01-58 and West Longitude 96-48-00.

operation on Channel 12 in Sherman, Texas, in lieu of Channel 12 at Ardmore, Oklahoma, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That the Application for Review filed by K-Twelve, Ltd. IS DISMISSED.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-352

In re Applications of

WCVQ, INC.	File No. BPCT-871224KG
NICHOLS BROADCASTING CORPORATION	File No. BPCT-880301KF
LAKE CHAMPLAIN COMMUNICATIONS, INC.	File No. BPCT-880301KH
BURLINGTON CHANNEL 44, INC.	File No. BPCT-880301KI
BURLINGTON 44 COMPANY	File No. BPCT-880301KL
DAVID McMEEKIN	File No. BPCT-880301KM

For Construction Permit
for New Television Station,
Channel 44,
Burlington, Vermont

Appearances

Howard M. Liberman and *Gerald Stevens-Kittner*, on behalf of WCVQ, Inc.; *Richard J. Bodorff* and *Jonathan W. Emord*, on behalf of Nichols Broadcasting Corporation; *Barry A. Friedman* and *Rebecca L. Dorch*, on behalf of Lake Champlain Communications, Inc.; *Robert J. Buenzle* and *Henry E. Crawford*, on behalf of Burlington Channel 44, Inc.; *R. Clark Wadlow, William J. Andrle, Jr.*, and *David E. Worthen*, on behalf of Burlington 44 Company; *John M. Shoreman*, on behalf of David McMeekin; and *Y. Paulette Laden* and *Charles E. Dziedzic*, on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted: July 17, 1992; **Released: July 29, 1992**

By the Review Board: BLUMENTHAL, ESBENSEN, and GREENE.

Board Member BLUMENTHAL:

1. In an *Initial Decision*, 4 FCC Rcd 8554 (1989) (*I.D.*), Administrative Law Judge Edward Luton (ALJ) granted the application of Lake Champlain Communications, Inc. (LCC) under the standard comparative issue, after expanding that issue to include evidence of comparative coverage. *Order*, FCC 87M-3582, released October 6, 1988. Exceptions were filed by WCVQ, Inc. (WCVQ), Nichols Broadcasting Corporation (Nichols), LCC, Burlington Channel 44, Inc. (Channel 44), Burlington 44 Company (Burlington 44), and David McMeekin (McMeekin).[1] While exceptions were pending, the Review Board lost jurisdiction over the proceeding when the Commission remanded the case for further hearing pursuant to an application for review on an earlier interlocutory matter. *Memorandum Opinion and Order*, 5 FCC Rcd 3824 (1990). Prior to the commencement of hearing, however, the parties filed a motion with the ALJ to terminate the remand hearing, reporting they had entered into a joint stipulation mooting the matter at issue. The ALJ granted the motion, thus returning jurisdiction of the case to the Board. *See Order*, FCC 91M-2679, released August 29, 1991.

2. Thereafter, we directed the parties to supplement their joint engineering exhibit on coverage, *see Memorandum Opinion and Order*, 6 FCC Rcd 7209 (Rev. Bd. 1991), because in the interim following the release of the *I.D.*, the Commission modified its practice on calculating underserved areas and populations. *See Channel 32 Broadcasting Co.*, 6 FCC Rcd 5188 (1991). It announced that it would no longer exempt the signals of noncommercial educational stations from the calculations. *Id.* The *I.D.* had awarded WCVQ, Nichols, and Burlington 44 substantial coverage preferences, *see* 4 FCC Rcd at 8565 para. 151, which those parties argued in their exceptions should have been decisional, but the joint engineering exhibit on which the preferences were derived excluded noncommercial television station signals. Pursuant to our *Order*, the parties filed a Joint Stipulation as to the augmented coverage data, and individual comments, on February 27, 1992. The Mass Media Bureau filed Consolidated Comments on March 9, 1992.

3. We have reviewed the *I.D.* in light of the exceptions filed in early 1990, oral argument held before a panel of the Board on November 22, 1991, the Joint Stipulation and comments thereon, and our examination of the record. The Board adopts the findings of fact and the conclusions of law in the *I.D.*, except as modified herein. We reverse the ALJ's ultimate conclusion, however, and find that prior Commission precedent mandates the grant of Nichols' application.

BACKGROUND

4. Under the criteria of the standard comparative issue set forth in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), the ALJ awarded four of the applicants -- LCC, Nichols, Burlington 44, and McMeekin -- 100% quantitative "integration" credit for proposing their owners into station management. 4 FCC Rcd at 8563-8565 paras. 130, 135, 145, 148. He found that LCC's qualitative enhancements were superior be-

[1] The *I.D.* also denied the application of Maple Leaf Broadcasting Limited Partnership. That applicant did not file exceptions to the *I.D.*, and its application was dismissed by *Order*, 7 FCC Rcd 1318 (1992), for failure to prosecute.

cause only LCC included both minority ownership and service area residence/civic activities, the two elements accorded the greatest enhancement weight under the integration factor. 4 FCC Rcd at 8565 para. 152. *See generally Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985).[2] He gave only minimal weight to the "substantial" coverage preferences in his overall comparative reckoning, notwithstanding that Commission precedent suggests that a substantial preference for underserved areas and populations may prevail over a substantial integration preference. *See, e.g., FBC, Inc.*, 95 FCC 2d 256, 258, 262 (Rev. Bd. 1983). 4 FCC Rcd at 8565 para. 151.

COVERAGE

5. The substantial preferences awarded by the *I.D.* to WCVQ, Nichols, and Burlington 44 were based on the then-record evidence that they would provide combined new first and second television services to substantial populations,[3] as well as serve much larger overall populations than their opponents. The *I.D.* found no significant differences between WCVQ and Nichols, and, thus, treated them as equal, but gave both a slight preference over Burlington 44 because that applicant's proposed second service was cognizably smaller. 4 FCC Rcd at 8565 paras. 149-150. Channel 44 and LCC both excepted to the preferences; Burlington 44 argued that its coverage was equal to that of WCVQ and Nichols; and WCVQ argued that it should have received a slight preference over Nichols.

6. The updated supplemental Joint Stipulation provides for the use of Joint Engineering Exhibit 2.[4] That exhibit shows the following coverages:

TOTAL AREAS AND POPULATIONS SERVED

Applicant	Area (sq. km.)	Population (1980 Census)
WCVQ	29,900	574,700
Nichols	29,400	562,300
Burlington 44	28,500	553,900
Channel 44	23,300	470,800
David McMeekin	22,500	465,700
LCC	21,400	453,800

UNCOMMON AREAS and POPULATIONS SERVED

Service Area	(square kilometers) First	Second	Third	Fourth	Fifth
WCVQ	7	610	450	1,360	2,970
Nichols	3	570	430	1,290	2,870
Channel 44	0	90	400	900	1,640
Burlington 44	0	2	350	1,370	2,640
David McMeekin	0	0	340	900	1,370
LCC	0	0	270	720	1,170

Service Population	(1980 Census) First	Second	Third	Fourth	Fifth
WCVQ	30	1,430	900	12,400	53,000
Nichols	10	1,330	900	12,100	51,600
Channel 44	0	280	790	9,500	37,300
Burlington 44	0	20	670	12,900	46,300
David McMeekin	0	20	630	9,200	34,800
LCC	0	0	440	8,800	32,400

7. In its comments on the supplemental engineering data, the Bureau contends that WCVQ and Nichols should each continue to receive a coverage preference, despite the reduction in underserved areas and populations, albeit a moderate preference over the next strongest applicant rather than the substantial one awarded by the *I.D.*, citing *Christian Broadcasting of the Midlands, Inc.*, 99 FCC 2d 578, 583 (Rev. Bd. 1984), *review denied*, 103 FCC 2d 375 (1986), *recon. denied*, 2 FCC Rcd 7395 (1987). As between WCVQ and Nichols, the Bureau states that the differences in population are insignificant. For its part, WCVQ acknowledges that its claimed preference should be reduced from "substantial" to "slight-to-moderate" over all the applicants (except Nichols) when noncommercial signals are considered; but it continues to assert that it should receive a slight preference over Nichols. Nichols, on the other hand, seeks the same preferences awarded by the *I.D.* for the original showing. LCC, joined by Channel 44, renews arguments from its exceptions that comparative coverage should not have an impact on the selection of the permittee in this proceeding. First, it reports that WCVQ, Nichols, and Burlington 44 have not received Canadian concurrence to their proposed tall tower operation at 5000 kilowatts; thus, it argues that any preferences for coverage would be based on speculation. Second, LCC challenges the accuracy of the data in the Joint Engineering Exhibit, asserting that the additional populations purportedly served by WCVQ and Nichols are located in rural areas "almost entirely... mountainous," making it doubtful the residents could receive the stations' over-the-air signals. LCC alternatively argues that, at best, even if the data is considered, it entitles WCVQ, Nichols, and Burlington 44 to only a very slight preference, citing as support *Louisiana Super Communications Ltd. Partnership*, 102 FCC 2d 1293 (Rev. Bd. 1985). LCC further argues that if alternative video sources are included in the calculations, no basis for a coverage preference exists.

8. *Discussion.* The Commission traditionally awards the largest preferences to applicants that provide new first and second daytime or nighttime services. *See FBC, Inc.*, 95 FCC 2d at 258-261 (substantial preference for proposing a new first television service to 2309 persons and second service to 355 persons, as well as some new third service)(subsequent history omitted); *Communications Properties, Inc.*, 92 FCC 2d 45, 49 (Rev. Bd. 1982)(moderate preference for second service to 4,456 persons, but no first service)(subsequent history omitted). A smaller preference

[2] LCC also received credit for 85% female ownership. Subsquent to the release of the *I.D.*, however, the Court held in *Jerome Thomas Lamprecht v. FCC*, 958 F.2d 383 (D.C. Cir. 1992), that the Commission's sex-based preference policy violates the Fifth Amendment to the Constitution. Thus, the gender preference will be stricken.

[3] The ALJ's treatment of the underserved areas and populations was primarily predicated on the applicants' proposed second services because their first services were either insignificant or entirely lacking.

[4] This exhibit had been tendered at hearing, but it was rejected because of its inclusion of noncommercial signals. It was only after the release of the *I.D.* that the Commission clarified the need to consider noncommercial services. *See supra* para. 2.

is also awarded to applicants that provide new third, fourth, and fifth services to substantial populations, *see Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1112-1113 (Rev. Bd. 1984)(slight preference for third and fourth services to 51,853 persons more than opponent)(subsequent history omitted). An even smaller preference is given to applicants that provide substantially greater overall coverage than their opponents, even where the areas are well-served with five or more existing services. *See Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485 (1991)(preference for a 22% differential advantage in overall population coverage). Here, the coverage differences between WCVQ and Nichols are *de minimis*. Nichols' overall coverage differs from that of WCVQ by less than 1%; and his proposed third, fourth, and fifth services are only 1700 persons fewer. He will provide a new second service to 1330 persons compared to 1430 persons for WCVQ. Neither *Radio Jonesboro*, where there was a 7.5% population difference in third and fourth services, nor *Communications Properties*, where one applicant proposed a new second service to 4456 persons, cited by WCVQ for a slight preference in its favor, are apposite for they involved much larger coverage disparities than are present between WCVQ and Nichols.

9. The proposals of WCVQ and Nichols are markedly superior to Channel 44, McMeekin, and LCC, however. WCVQ will provide new first and second services to 1460 people, which is 1180 more people than will be reached by Channel 44, the only applicant other than WCVQ and Nichols to provide a new second service. WCVQ will also provide new third, fourth, and fifth services to 66,300 people, which is 18,710 more people than Channel 44, and will serve 18% more people overall than Channel 44. Those differences are sufficient to warrant a moderate preference. *See generally Christian Broadcasting*, where the Board awarded a moderate-to-substantial preference to an applicant that proposed: (1) new first and second services to a total of 3954 persons; (2) new third and fourth services to 45,468 persons; and (3) a total of 24% greater population than its opponent. The reduction in the magnitude of the preference here from that given in *Christian Broadcasting* is because the first and second services proposed by WCVQ are not as large as found there. Nichols' proposal is comparable to that of WCVQ, warranting a like preference. It will provide a new first and second services to a total of 1340 persons and a new third, fourth, and fifth services to a total of 64,600 persons, and it has a population advantage of 17% over Channel 44. McMeekin and LCC lag further behind WCVQ and Nichols inasmuch as their coverage proposals are inferior to that of Channel 44.

10. A slightly different analysis is required for Burlington 44 because its overall coverage, and new third, fourth, and fifth services are closer to those proposed by both WCVQ and Nichols. Nonetheless, both WCVQ and Nichols are entitled to decisive preferences over that applicant because Burlington 44 proposes no new first or second service, which as noted above, *see supra* paragraph 8, are traditionally accorded the greatest weight. *See, e.g., Christian Broadcasting*, 99 FCC 2d at 583.

11. LCC's procedural arguments do not bar consideration of the coverage analysis in the comparative calculus. Initially, LCC's Canadian clearance argument is unavailing. The failure to obtain prior Canadian approval for similar operations has not acted as a prohibition to an award of a comparative preference. *See Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240, 1241 para. 5 (Rev. Bd. 1987).[5] LCC's attack on the accuracy of the data included in the Joint Engineering Exhibit is similarly unavailing. LCC joined in the Exhibit and the Joint Stipulation agreeing to its use, and it failed to adduce any probative evidence that "persuasively demonstrate[s] that the computations therein are materially inaccurate or otherwise unreliable." *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3951 para. 13 (Rev. Bd. 1988), *recon. denied*, 3 FCC Rcd 5631 (Rev. Bd.), *review denied*, 5 FCC Rcd 5561 (1990). It cannot now complain that the computations should be disregarded. LCC's final argument that alternative video sources should be permitted to diminish any coverage preference has also previously been rejected by the Commission. *See Washoe Shoshone Broadcasting*, 3 FCC Rcd at 5634 para. 14, and cases cited therein.

INTEGRATION

12. The case precedent holds that a significant coverage preference will prevail in the face of *quantitatively* equal integration proposals. *See Christian Broadcasting of Midlands, Inc.*, 99 FCC 2d at 582-584; *see also Radio Jonesboro, Inc., supra*, 96 FCC 2d at 1112 n.7 ("function of qualitative enhancement[s]... is to enhance the value of quantitative integration credit"; "slight overall preference appropriately reflects the impact of superior enhancements on the quantitative equality..."). Thus, the significant coverage preferences awarded to WCVQ and Nichols become decisional as to the other applicants, including LCC, the winner below, when combined with their quantitatively equal integration proposals.[6] *See generally Christian Broadcasting of Midlands, Inc., supra* at 583-584; *see also supra* para. 4. For this reason, we have focused on those exceptions that relate to the integration proposals of Nichols and WCVQ. *See Colonial Communications, Inc.*, 6 FCC Rcd 2296 (1991)("An agency, like a court, need not decide questions which are not relevant to its decision").

13. *WCVQ*. WCVQ is a two-tiered Vermont corporation, comprised of one voting shareholder, Christopher McClure, who has proposed to work at the station full-time as general manager. McClure has a 25% equity interest in the applicant. 4 FCC Rcd at 8554 paras. 3-4; 8555 para. 11. The nonvoting stock is owned by The Shaffran Companies, Ltd. (65% of the equity) and Thomas Johnston (10%). *Id.*, at para. 5. WCVQ's by-laws provide that the business and affairs of the corporation are to be managed by a board of

[5] *Newton Television Limited*, 3 FCC Rcd 553, 560 n.24 (Rev. Bd. 1988)(subsequent history omitted), does not hold otherwise. That case merely cautioned that a subsequent failure to secure permission from Canada would be a change in "core circumstances" and require a reconsideration of the decision. Canadian approval was, in fact, obtained by the time the case was before the Commission on review. *See also Newton Television Limited*, 4 FCC Rcd 2561 (1989). We note that the Bureau reported that "Canada approved a 5000 kilowatt proposal for Burlington, Vermont in 1988," *see* Comments at 5, which would moot this issue in any event.

[6] LCC's opponents except to the ALJ's award of full integration credit to LCC.

directors, now consisting of McClure, John F. McGrath, and Alan Newman. *Id.*, paras. 6-7. The ALJ held that McClure was entitled to only 33.3% quantitative integration credit rather than the 100% claimed, basing his ruling on the requirement in WCVQ's by-laws that the board take its actions by majority vote and on McClure's deposition testimony that he would "go along" with decisions where he was outvoted. *Id.* at paras. 8-9, 125-126.[7] At hearing, McClure stated that he would either abide by majority decisions or he would dismiss his fellow board members, as he has the power to do. *Id.*, at para. 9. The ALJ rejected WCVQ's claim that McClure's power to remove his fellow directors provided the necessary assurance that only McClure will be "running the show," reasoning that McGrath and Newman were personally selected by McClure because of their management skills. *Id.*, at para. 126.

14. WCVQ contends that the ALJ erred in reducing its quantitative credit to 33.3%. Vermont law requires that a corporation with more than two shareholders have a board of directors consisting of at least three persons. McGrath and Newman, who are friends of McClure, agreed to serve as "outside directors – persons who have no inside role in the management of the corporation but who provide, as board members, their expertise in a consultant-like capacity." WCVQ Exceptions at 7. McGrath is an officer of a local bank; Newman's area of expertise is in marketing. WCVQ asserts that McClure is well aware that he has the power to exercise ultimate control over the applicant and that the by-laws provide that board members may be removed "without cause" by the voting shareholder. Moreover, WCVQ refers to record testimony that it has been McClure who has exercised complete control over every element of the application process. It further adverts to McClure's extensive past broadcast experience detailed in paragraphs 10-30 of the *I.D.*, contrasting it with that of McGrath and Newman, each of whom has none. Finally, it reports that it is unaware of any precedent in which mere board membership (without any ownership interests) in a for-profit corporation by any individual, absent other extrinsic evidence of an ability to control, adversely affected the integration credit awarded to voting owners.

15. The Board will award WCVQ 100% quantitative credit. During the interval following the exceptions and replies, the Commission ruled on the point in issue. In *Coastal Broadcasting Partners*, 7 FCC Rcd 1432, 1437 n.8 (1992), which involved a corporate applicant required by state law to have two directors, the Commission rejected the argument that this requirement diluted the sole voting stockholder's authority to manage the corporation and required a reduction in the applicant's quantitative integration credit. It held that the appointment of a director would only affect the applicant's integration credit to the extent that the director had an ownership interest in the applicant or his involvement indicated that he was an undisclosed owner under *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 10 (1990).[8] It further took into account that the voting stockholder could remove the second director without cause under the Articles of Incorporation. The cases relied upon by the parties here, in which integration credit was diminished because of directorships, all involved directors with ownership interests where their positions as directors violated the "no material involvement" standard for insulating their equity interests from comparative consideration. *See generally Doylan Forney*, 3 FCC Rcd 6330, 6335-6336 (Rev. Bd.) and cases cited in para. 31 therein, *review denied*, 5 FCC Rcd 5423 (1990), *aff'd by judgment sub nom. Maricopa Media, Inc. v. FCC*, 951 F.2d 1324 (D.C. Cir. 1991).[9] Here, neither McGrath nor Newman has an ownership interest in the applicant; neither proposes to work at the station; and, as in *Coastal*, both are subject to removal by McClure with-

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[7] The transcript testimony on which the ALJ cited for his adverse ruling reads in pertinent part as follows:

> Counsel: Okay, now, specifically, looking at the third paragraph in section 3.5 [what constitutes a quorum relative to actions taken by the board of directors], what is your understanding of that clause?
>
> McClure: That the act of the majority of directors voting at the meeting at which a quorum is present shall be the act of the board of directors.
>
> Counsel: So, then in theory then, at least according to your by-laws, Mr. McGrath and Mr. Newman could make a decision in their capacity as holding a quorum, they could make a decision that you could, in theory, disagree with. Isn't that a possibility under these by-laws?
>
> McClure: That is a possibility, sir.
>
> Counsel: And what would you do in those circumstances? Would you abide with that decision?
>
> ***
>
> McClure: I would either abide by it or I would dismiss them, one of the two. As chairman of the board and as the principal stockholder, I own all of the class A voting stock. I can dismiss them.
>
> ***
>
> Counsel: And -- well, would you turn, please, to your deposition again at page 59?
>
> Counsel: The question was, "As to what you would do in that -- in that sort of situation," referring to the situation that we've just described, the answer was, "I've carefully chosen," [sic] it says, by, but it's a, I believe a typo for "my board of directors, for their wisdom, and if they so vote, then according to my by-laws, I would go along with that vote."

Tr. 147-149.

[8] The Commission has consistently refused to award integration credit to applicants, even where sought, for full-time management roles proposed by nonowner directors, declaring "that only those with an ownership interest can be considered in evaluating an applicant's integration proposal." *Triple C Broadcasting Corp.*, 16 FCC 2d 357, 363 (Rev. Bd. 1969).

[9] In its reply exceptions, Burlington 44 cites to *Richard P. Bott, II*, 4 FCC Rcd 4924, 4928-4929 paras. 23-26 (Rev. Bd.) (subsequent history omitted), as support for the *I.D.* In *Bott*, a sole proprietor proposing full-time integration was given only 50% integration credit because of the active participation of her spouse. However, the record there showed that her spouse had been active in virtually every aspect of the prosecution of the application, supporting the ALJ's conclusion that the principal and her husband had functioned, and would likely function, as a marital unit in the operation of the station. *Id.* That is obviously dissimilar to the case here.

out cause. 4 FCC Rcd at 8563 para. 124, 8566 n.1. There is no suggestion or evidence that either is an undisclosed owner. The purpose underlying integration credit is to encourage full-time participation in station operation by "owners," thus closely associating legal responsibility and day-to-day performance. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d at 395. That is all that we have here.[10]

16. *Nichols.* Nichols is a Vermont corporation, with one shareholder, John C. Nichols, who proposes to work full-time as the station's general manager. 4 FCC Rcd at 8556 paras. 31-32. He is entitled to 100% quantitative credit.[11]

17. *Qualitative Enhancements.* Nichols has lived in the service area since 1972, and moved to Burlington, Vermont in 1988, several months after his application was filed. He will continue to reside in Burlington. 4 FCC Rcd at 8556 para. 33. Nichols has been involved in local civic affairs, serving on the board of directors of the Multiple Sclerosis Society from 1978-1983 (receiving various awards for his services); organizing and serving as lead host of the March of Dimes Telethon against birth defects in 1986 (for which he also received an award) and co-host in 1987 Bid for Bachelors; providing a benefit fund-raising dance in 1977 for Howard Mental Health Services, a community mental health organization in Burlington; and providing free music entertainment in 1985-1986 for a summer camp for children with cancer and co-hosting a dance in 1987 on a tour ship on Lake Champlain for children with cancer. 4 FCC Rcd at 8556 paras. 3440. He also has varied and extensive past broadcast experience including both staff and management positions: clerical assistant in 1969 to the Chief of Network Operations for the ABC TV Network in New York; co-producer and co-anchor of a youth oriented news program aired on KOCO-TV, Oklahoma City in 1970; editorial and production assistant and traffic supervisor during 1970-1972 for the British Broadcasting Corporation; sales representative for WSNO-FM, Barre, Vermont (located in the service area) from 1973-1974; staff announcer, sales representative, program director, and sales manager for WJOY-AM and WQCR-FM, Burlington, Vermont from 1973 until 1982; and part owner and general manager of Station WXXX(FM), Burlington, Vermont during 1984 and 1985. *Id.* at paras 41-45.[12]

18. In comparison, WCVQ's sole voting shareholder, Christopher McClure, resided in Burlington from May 1971 until June 1977, and has lived in Hanksville, Vermont, for the last eleven and one-half years. *Id.* at 8555 para. 13. Hanksville is located within the service area. He will continue to reside at his current address if his application is granted. *Id.* His civic activities prior to the filing of the application are less extensive than Nichols', consisting of volunteer service on the Vermont Council on the Arts, Media Grants Judging Committee, in 1985 and 1986 (making recommendations of awards to the Council); soliciting contributions from local corporations during 1987 for the Green Mountain Council. Boys Scouts of America; and assisting the Child-Seekers of Vermont in June 1987 to create child identification records. *Id.* at paras. 14-18. McClure's past broadcast experience includes: disc jockey in 1962; staff announcer during his college years with his college's carrier current AM station; crew chief for four operating studios for the American Samoa Television Project from 1966 to 1967; producer and director for the University of Illinois' instructional television facility from 1967 to 1970; participant in designing and constructing a television studio for the University of Vermont from 1971

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[10] WCVQ's direct written case and McClure's testimony further buttress this conclusion. Its "Integration Statement" (WCVQ Exh. 2) reads as follows:

> As General Manager, Mr. McClure will exercise overall supervision of all facets of the management and operation of the station, including supervision of the station's programming, marketing, financial management, community service, personnel policies, hiring and termination of employees....

At hearing, McClure responded under cross-examination when asked about borrowing money:

> I believe that the board has the authority to borrow money, but that I, as President of the corporation, will direct the budget.
>
> I'm running the show, not my board.

Tr. 145. Later, he continued:

> I say it again. These [the directors] are intelligent men and if they make a decision on -- on something on the board of directors, I will carefully consider that decision, and I will respect their opinion, because I've carefully chosen them for their wisdom, but if it -- if push comes to shove, sir, I have the power, as the class A voting shareholder, to dismiss members of my board, and I am running this business.
>
> I am in control of this corporation, sir.

Tr. 151.

[11] In exceptions, the parties attacked the reliability of Nichols' integration commitment, largely because he had promised to be integrated full-time at Station WXXX(FM), Burlington, Vermont, but had worked there only four and one-half months. The parties alleged that Nichols was discharged because he failed to work full-time in his general manager position. Nichols had been a principal of the applicant receiving the construction permit, pursuant to a settlement agreement in which all of the applicants merged. His equity interest was only 28.3 after the merger. This concern was also raised to the Commission in an application for review filed June 19, 1989, which resulted in the remand of the case for further hearing. *See Memorandum Opinion and Order*, 5 FCC Rcd 3824. *See* paragraph 1, *supra*. At the remand hearing, the parties stipulated that there was no significant probative evidence that Nichols did not, in fact, work in excess of forty hours per week at the station. *See Memorandum Opinion and Order*, FCC 89M-1264, *supra*. There is no evidence here that Nichols voluntarily abandoned his integration proposal or that his discharge involved misconduct. The record shows only that Nichols, a minority shareholder, was discharged involuntarily by those in control of the station. The stipulation moots exceptions by WCVQ and LCC to the ALJ's failure to add a misrepresentation issue against Nichols based on the same allegation. The parties also argue that Nichols' testimony establishes that he was evasive surrounding his discharge. A review of the relevant testimony, however, reflects that counsel are merely quibbling over Nichols' answers. *See, e.g.*, Tr. 387-388; 399-401.

[12] He has also owned a disc jockey service, working part-time, providing dance music entertainment. He currently has a broadcast consulting business, which he will discontinue if granted the construction permit. 4 FCC Rcd at 8556 paras. 43-45.

until 1976; producer and director of news programming for a television network affiliate in Burlington for six months in 1981; and a videographer for ESPN in 1983. 4 FCC Rcd at 8556 paras. 26, 27, 23.[13]

19. Although the ALJ did not compare the qualitative enhancements of WCVQ against those of Nichols, since he had reduced WCVQ's quantitative credit to 33.3%, he stated that WCVQ was entitled to a moderate to substantial local residence qualitative credit (based on McClure's residence in Burlington) and a slight civic credit. *Id.* at 8563 para. 127. Nichols was given moderate credit for both local residence and civic activities. *Id.* para. 131. Both WCVQ and Nichols received past broadcast experience credit, but the ALJ characterized Nichols' experience as "considerable." *Id.* WCVQ would strengthen its enhancement credit awarded by the *I.D.* for civic activities by including under that rubric McClure's efforts in 1975, 1977, and 1982 of producing video documentaries on home birth, dying, and the country's longest continuous running fair, but we perceive no error because there has been no showing how these documentaries familiarized McClure with the needs and interests of the community. *See generally Ronald Sorenson*, 6 FCC Rcd 1952, 1953 paras. 8-9 (1991)(denying civic credit for producing and airing public service announcements). WCVQ would diminish Nichols' civic enhancement credit on the ground that Nichols' activities have gradually been diminishing, and that at least one of his activities was work-related. It asserts that in 1985 and 1986 Nichols had no regular membership with any civic organization and participated in only a few events throughout the year, citing to *Talleyrand Broadcasting*, 103 FCC 2d 476, 480 (Rev. Bd. 1985) for reducing Nichols' credit. We will deny these exceptions. The record in this proceeding reflects a pattern of civic participation on the part of Nichols over an extended period of time continuing up to the filing of his application. We perceive no principled basis for discounting Nichols' activities. *See also Great Lakes Broadcasting, Inc.*, 7 FCC Rcd 1829, 1831 para. 17 (Rev. Bd. 1992)(activities not diminished for being workrelated). Although commendable, we would not characterize Nichols' activities as substantial as urged by Nichols.

20. *Final Evaluation.* To say the least, this is a uniquely close comparative case. But in *Sorenson*, 6 FCC Rcd at 1952, the Commission held that local residence and civic activities are to be treated as a single unified enhancement factor, both attributes "indicating a knowledge of and interest in the welfare of the community." *Id.*, at 1953. Local residence and civic activities commenced *after* the filing of the applications are only accorded very minor weight. *See, e.g. Oliver Kelley and Mary Ann Kelley*, 6 FCC Rcd 7377, 7382 n.15 (Rev. Bd. 1991)*review denied*, FCC 92-278, released July 2, 1992; *Beach Broadcasting Limited Partnership, supra*, 6 FCC Rcd at 4485. Past broadcast experience is a separate factor, but is accorded less weight in the comparative analysis than local residence and civic activities. *See Kennelwood Broadcasting Co., Inc.*, 7 FCC Rcd 520 (1992). Here, WCVQ's McClure has six years of past residence in Burlington; but because he last lived in Burlington more than eleven years ago, this extra advantage is substantially diminished by the remoteness in time. *See generally Ruth Payne Carmen*, 1 FCC Rcd 46 (Rev. Bd. 1986); *see also Colonial Communications*, 6 FCC Rcd at 2297 para. 10. On the other hand, Nichols became involved in civic activies a decade earlier than McClure, and has been continuously involved in local affairs since then in both leadership and participatory roles. On balance, Nichols is entitled to a very slight overall preference for residence and activities that indicate a knowledge of and interest in the community. *See, e.g., Sorenson*, 6 FCC Rcd at 1953-1954, where an applicant with long-term residence and better civic enhancement prevailed over an applicant whose principal had life-time local residence. Nichols also is entitled to a very slight preference for past broadcast experience. Although both applicants have been involved in broadcasting or related activities for many years, Nichols has a very slight edge for his greater management experience. When the relevant qualitative enhancements are weighed, the overall integration advantage must go to Nichols.[14] As Nichols and WCVQ have been found equal on coverage, Nichols' slight integration preference becomes decisional.[15]

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[13] Since 1983, he has been an Assistant Professor of Journalism at St. Michael's College, where he teaches courses in broadcast journalism and serves as the faculty advisor for a student-run noncommercial educational FM station licensed to the College. *Id.* at 8555 para. 10.

[14] The slight advantage Nichols enjoys over WCVQ on the integration criterion outweighs any advantage WCVQ arguably might be entitled to for its minor coverage superiority. *See generally National Communications Industries*, 6 FCC Rcd 1978, 1982 para. 27 (1991)(subsequent history omitted)(slight integration preference prevails over very slight coverage preference); *see also Eugene Walton*, 6 FCC Rcd 6071, 6078 para. 35 (Rev. Bd. 1991)(subsequent history omitted)(accord). Were WCVQ to prevail, however, the proceeding would have to be remanded on a financial issue against WCVQ. McClure, who certified to WCVQ's financial qualifications, relied simply on the verbal assurances of Edward Shaffran, representative of the proposed lender -- a family-owned entity, CC&E -- that CC&E had the financial wherewithal to fund WCVQ's construction and operations costs, and the assurance consisted of a bare representation that CC&E had $1,500,000 in cash and marketable securities and a net worth in excess of $4,900,000. The liquid assets were far short of the $3,500,000 estimated by WCVQ to be necessary for the requisite costs and there was no indication that the other assets could be readily converted to cash. *See generally Texas Communications Limited Partnership*, 6 FCC Rcd 5191 (1991), *recon. denied*, 7 FCC Rcd 3186 (1992).

[15] It cannot be gainsaid that the comparative differences between our two finalists are, when viewed from a more remote perspective, so minor as to make *any* choice appear more rationalization than rational. But, several observations may be made: *first*, although exceedingly close comparative cases were far from rare in the past, *see, e.g., Sacramento Broadcasters v. FCC*, 263 F.2d 689, 693 (D.C. Cir. 1956) ("a slight difference may be decisive when greater differences do not exist"), particularly in contrast to the last decade where finding even *one* basically qualified applicant out of the hundreds of unscrupulous license speculators has been an administrative ordeal, we *have* recently resolved on comparative grounds cases equally as close (or nearly so), *see, e.g., Rebecca L. Boedker*, 6 FCC Rcd 2557 (1991), *aff'd per judgment* No. 91-1277 (D.C. Cir. Apr. 24, 1992) ("a close case"); *second*, winning an important contest "by barely a nose" is *everywhere* simply a fact of life, be it a horse race, a presidential race, or a race to a particular courthouse, *see, e.g., Schurz Communications, Inc. v. FCC*, No. 91-2350 and Consolidated Cases (7th Cir. 1992); and, *third*, with perhaps the encouragement of the court, *see Susan M. Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992), the Commission has initiated a pro-

21. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend, filed by Nichols Broadcasting Corporation on January 8 and April 10, 1990, and July 7, 1992, respectively, ARE GRANTED, and the amendments ARE ACCEPTED; that the petition for leave to amend, filed by Burlington 44 Company on February 20, 1990 IS GRANTED, and the amendment IS ACCEPTED; that the petition for leave to amend, filed by Lake Champlain Communications, Inc. on November 4, 1991 IS GRANTED, and the amendment IS ACCEPTED; and that the Request for Oral Argument on the Impact of Joint Engineering Exhibit No. 2 IS DENIED;[16] and,

22. IT IS FURTHER ORDERED, That the application of Nichols Broadcasting Corporation (File No. BPCT-880301KF) for authority to construct a new television station on Channel 44 at Burlington, Vermont IS GRANTED; and that the applications of WCVQ, Inc. (File No. BPCT-871224KG), Lake Champlain Communications, Inc. (BPCT-880301KH), Burlington Channel 44, Inc. (BPCT-880301KI), Burlington 44 Company (BPCT-880301KL), and David McMeekin (BPCT-880301KM) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

ceeding to reexamine its 1965 comparative criteria, with an eye toward possible improvement. *See Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992). (However, any changes announced therein will be purely prospective, *see id.*, at 2669.)

[16] Additional oral argument would not be of assistance here since the coverage issue is neither extraordinary nor complex, and a prior oral argument was held on November 22, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-298

In re Applications of

LUCINDA FELICIA PAULOS File No. BPH-880518MB

BODEGA COMMUNICATIONS, INC. File No. BPH-880519MD

JOHN A. CAROLLO, JR. File No. BPH-880519MX

MANZANITA MEDIA, INC. File No. BPH-880519NR

For Construction Permit for
New FM Station, Channel 229A,
Sebastopol, California

ORDER

Adopted: July 21, 1992; Released: July 28, 1992

By the Review Board: BLUMENTHAL, ESBENSEN, and GREENE.

1. Applicant Bodega Communications, Inc., has not filed Exceptions to the *Initial Decision*, 7 FCC Rcd 3145 (ALJ, released May 26, 1992), in the captioned proceeding. Therefore, its application will be dismissed for failure to prosecute pursuant to 47 CFR § 1.276(f).

2. ACCORDINGLY, IT IS ORDERED, That the application of Bodega Communications, Inc. (File No. BPH-880519MD) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: July 29, 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

San Francisco Century Broadcasting, L.P.
Licensee, Radio Station KMEL(FM)
875 N. Michigan Street
Chicago, Illinois 60611

8210-AJZ
92010049

Dear Licensee:

This letter constitutes a NOTICE of APPARENT LIABILITY for a FORFEITURE pursuant to Section 503(b) of the Communications Act of 1934, as amended.

The Commission has received information indicating that Radio Station KMEL(FM), San Francisco, California, may have violated 18 U.S.C. § 1464 by broadcasting allegedly indecent material during the Rick Chase show during daytime hours on various dates between August 20 and September 16. Transcripts of the allegedly indecent broadcasts are attached.

Pursuant to 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D), the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464, which provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication."

The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987). The United States Court of Appeals for the District of Columbia has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

We believe that the subject broadcasts from the Rick Chase Show were indecent and, because they aired at times when there was a reasonable risk that children may have been in the audience (between 2 p.m. and 6 p.m. Monday through Friday; 12 p.m. and 4 p.m. Saturday), are legally actionable. Thus, it appears that on various dates between August 20 and September 16, 1991, Station KMEL violated 18 U.S.C. § 1464 by airing indecent programming. Accordingly, pursuant to Section 503(b) of the Communications Act, San Francisco Century Broadcasting, L.P., is hereby advised of its apparent liability for a forfeiture of twenty-five thousand dollars ($25,000) for its apparent willful violation of 18 U.S.C. § 1464 on the dates set forth above. The amount specified was determined by using the criteria set forth in the *Policy Statement on Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, FCC 92-212, released June 4, 1992, and the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 U.S.C. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on July 22, 1992.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT

Radio Station KMEL(FM), San Francisco, CA

Date/Time Broadcast: 2:00 to 6:00 p.m. August 20, 21, 22, 23, 24, 26, 27, 29, and 30, and September 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14 and 16, 1991.

Material Broadcast: Excerpts of the Rick Chase Show

RC: Rick Chase

MC: Male Caller

FC: Female Caller

AN: Announcer

SM: Allegedly the voice of KMEL's station manager (apparently Rick Chase)

AN: With Rick Chase, it's time, once again, for Dinner Across America.

* *

RC: What's the last thing you had in your mouth? (Toy train whistle)

FC: (Laughs) I'm not saying.

RC: Did you have sex today?

FC: No. That's for dessert.

RC: About an hour ago you had sex, didn't you ma'am?

FC: (Laughs)

RC: Didn't 'ya. Huh?

FC: No.

RC: You had oral sex.

FC: You can't say that on the radio.

RC: I can say any damn thing I want. I can say vaginal.

FC: Huh?

RC: I can say vaginal and vaginal. (Toy train whistle)

FC: Now I know we're not on the air.

RC: (Laughs) That's the problem with Georgia. They're behind. (Toy train whistle) They're afraid to speak their mind in Georgia. I'm not. (Toy train whistle)

FC: 'Cause I'm not a Georgian, I'm a Californian.

RC: Crap ma'am. Who do you think wrote this letter?

* *

RC: KMEL.

FC: Yes, I'd like to talk to your station manager.

RC: About what?

FC: I don't know, but I would like to talk to him.

RC: OK, I'll be right back. I'll put him on, OK?

FC: I really want him.

RC: OK.

SM: Hello, this is Lloyd Kramer(?) [apparently Rick Chase impersonating the station manager, allegedly named Lloyd Kramer].

FC: I don't know if this is [nervous laugh], you know.

RC: Uh, yes ma'am, this is Lloyd Kramer, Can I help you?

FC: OK. I want to tell you that I was totally offended by whatever disc jockey was on just now. What is it, Rick, uh, whatever. I don't know who it was.

SM: Uh, what seems to be the problem, ma'am?

FC: OK, they were doing that dinner across the United States.

SM: Yes ma'am.

FC: OK. Did you hear that segment he just did with that poor girl from Georgia?

SM: Yes we did ma'am.

FC: OK. Do you have... I hope you've gotten more complaints than just mine.

SM: Uh, you're the first one to complain, ma'am.

FC: Well, I'll tell you I not only was offended and it's not just the sexual explicit, you know, language.

SM: Well, well, what exactly did he say that offended you, ma'am?

FC: OK. Number one, the fact that you're dealing with children who are watching this...

SM: Hold it ma'am. What exactly did he say that offended you, though?

FC: OK. Number one, he offended me, the fact that he used the term "oral sex," what did you have in your mouth, what was the last thing that you had in your mouth.

SM: Uh, what, uh, what was the last time you had oral sex, ma'am?

FC: Excuse me! I am not. I know I'm not talking to the station manager.

SM: Have you ever had oral sex ma'am?

FC: Excuse me, you are so rude (Unintelligible).

SM: Have you (unintelligible). Do you, do you, do you have a problem having oral sex?

FC: (Unintelligible) You can't believe what I'm listening to here.

RC: Maybe you're too ugly to have oral sex. ("Looney Tunes" Music) See you later ma'am. And remember, everybody does it. Why be embarrassed about it. (Music)

* *

Male duet(MD) singing:

MD: You gotta blow me, hey, you hardly even know me, just set yourself below me and blow me tonight. Hey. A handy would certainly be dandy, certainly be dandy, but it's not enough to blow, hey, you gotta blow me, all night. (Looney Tunes music)

RC: There's only one Rick Chase, thank God for that.

**

Duet singing with chorus backing up lyrics

Blow me, you hardly even know me, just set yourself below me and blow me, tonight. Hey, a handy would certainly be dandy, but it's not enough to slow (?)(Unintelligible) me, hey, you gotta blow me all night. Hey, when you part your lips that way, I want you night and day, when you squeeze my balls so tight, I want to blow my love, hey, with all my might. So blow me, you hardly even know me, know me, just set yourself below me, you gotta blow me, tonight. Come on everybody. Blow me, blow me, you hardly even know me, you hardly even know me, so blow me, you gotta blow me, hey, so blow me, blow me tonight.

* *

MC: Hey could you play me "The Candy Man" 'cause I'm going to be knocking boots this whole weekend?

RC: Okay. With who?

MC: I don't know. It's a blind date so I hope everything is going to go well.

RC: It's a blind date and you're already expecting sex on the first time.

MC: Hey, you know. (Unintelligible), this is me you're talking to Rick. (Laughs)

RC: How many diseases...

MC: A little dinner, a little wine, what more could she ask for? You know what I mean?

RC: How many diseases do you have, sir?

MC: Aw, come on Rick, don't be like that.

RC: Got a big canker sore down there on Mister Winkie?

MC: Oh Rick, what are you doing? Don't be like that to me. You gotta...

RC: What's your first name?

MC: You gotta wish me luck.

RC: What. What's your name sir?

MC: My name's Al.

RC: Al.

MC: Yeah.

RC: Don't go out with Al, he's got a canker sore on Mister Winkie.

MC: Don't say that Rick.

RC: He's got diseases. He's not safe.

MC: Come on Rick.

RC: He might be good in bed but watch out a year later.

MC: Don't do that to me Rick.

RC: Canker sore on Mister Winkie.

MC: Don't do that to me, Rick.

RC: Put it back in your pants or wash it or something.

MC: Come on Rick, don't do that to me.

RC: Goodbye, have a great time. Feel sorry for the lady.

* *

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 22, 1992

Released: July 29, 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

McNulty	8310-GU
Broadcasting Corp.	C7-233
Licensee,	C9-869
Radio Station KALF-FM	C11-647
P.O. Box 1490	C11-1051
Red Bluff, CA 96080	C3-840

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY for a FORFEITURE pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

By way of background, in a letter dated July 28, 1990, addressed to Radio Station KALF-FM, Red Bluff, CA, c/o Arthur Belendiuk, the Commission, by the Audio Services Division, denied KALF's request to relocate its main studio from Red Bluff, California to Chico, California, because (1) KALF(FM) provided no evidence that suitable studio locations within KALF-FM's 3.16 mV/m contour were unavailable, and (2) KALF-FM offered no public interest justifications that would warrant moving the main studio outside its principal commmunity contour. In doing so, the Commission rejected the licensee's use of the National Bureau of Standards Technical Note 101 method to measure its signal strength.

Approximately a year later, in July 1991, the Commission received a complaint alleging that Radio Station KALF-FM, Red Bluff, CA, moved its studio to Chico, CA, in possible violation of Section 73.1125 of the Commission's Rules.

Station KALF-FM, Red Bluff, CA, was inspected by the Commission's Field Operations Bureau on August 28, 1991. During this inspection, the inspector confirmed that the "main studio" located at 737 Washington Street, Red Bluff, CA, was not an operating studio and that this office had no program origination capability nor any operational equipment present. Instead, the inspection determined that the studio in use is located at 312 Otterson Street, Chico, CA. On the other hand, the FOB reported that the public file was located in Red Bluff at an attorney' office located at 737 Washington Street. By letters of inquiry dated September 13, 1991, and March 6, 1992, the Commission requested that you submit to the Complaints and Investigations Branch comments and other information regarding this complaint. In your response filed March 23, 1992, by counsel you state that KALF's main studio is located at 737 Washington Street, Red Bluff, CA, and that McNulty Broadcasting maintains a toll free number at 1-800-331-5253. You further assert that the main studio has both program production and transmission capability. Additionally, included with the response was a study based on the National Bureau of Standards, Technical Note 101 which purports to demonstrate that KALF's auxiliary studio is within the requisite 70 dbu or 3.16 mV/m per meter contour. Your response further states that McNulty Broadcasting currently has a request pending with the Commission asking that it confirm that the Technical Note 101 study is technically correct. KALF has asked the FM Branch to make this showing part of KALF's license file once the accuracy of the report is confirmed. You state that this, in turn, will permit McNulty Broadcasting to designate certain KALF auxiliary studio and office facilities as its main studio.

Section 73.1125 clearly limits the location of a licensee's main studio to sites within the licensee's principal community contour. In the case of an FM station, this principal community contour is defined by Section 73.315(a) of the Commission's Rules as being within the licensee's 70 dBu or 3.16 mV/m contours.

Based on the information obtained by the Commission, it appears that McNulty Broadcasting Corporation has willfully violated Section 73.1125(a) (main studio) of the Commission's rules. Notwithstanding the assertion in your response that KALF's Red Bluff facility now has both program production and transmission capability, an August 28, 1991, inspection by employees of the Commission's Field Operations Bureau found no such capability present. Nor did it discover a full-time management and staff presence at that location. Although you argue that Chico studio is within the appropriate contour when measured using National Bureau of Standards Technical Note 101, you had previously been informed that this method of calculating principal community contour for purposes of main studio is unacceptable. As noted above, on July 28, 1990 you were unambiguously informed that this method was unacceptable. You were explicitly told that "The Memorandum Opinion and Order cited [3 FCC Rcd 5024 (1988)] clearly states that the "predicted" contour is the only applicable principal community contour under the FM processing rules.... Since we can only consider the "predicted" contour in determining the principal community for all FM stations, the "actual" contour measurements you submitted with your letter request cannot be considered."

It appears that having been unsuccessful in obtaining Commission permission to locate your main studio in Chico you nevertheless relocated it to that community, and when discovered, rely on the same arguments previously rejected. The Commission cannot allow licensees to take it upon themselves to make decisions that are not in compliance with our rules. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, McNulty Broadcasting Corporation, is hereby advised of its apparent liability for a forfeiture of ten thousand dollars ($10,000).

The amount specified was reached after consideration of the factors in Section 503(b)(2) of the Communications Act and in our recently adopted *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4659 (1991), *recon. denied* FCC 92-212 Under these standards, $10,000.00 is the base forfeiture amount for a violation of Section 73.1125 of the Commission's Rules.

In regard to this forfeiture proceeding, you may, within thirty (30) days from the date of this Notice take any of the actions set forth in Section 1.80 of the Commission's Rules as summarized in the attachment to this Notice.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosures
cc: Arthur V. Belendiuk, Esquire:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

McNulty Broadcasting Corp.
Licensee, Radio Station KALF-FM
P.O. Box 1490
Red Bluff, CA 96080

Arthur V. Belendiuk, P.C.
2033 M Street, N.W.
Suite 207
Washington, D.C. 20036

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Media Partners, L.P.
Licensee of Station KRYS-FM
Corpus Christi, TX 78408

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 1992; Released: July 29, 1992

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration a Notice of Apparent Liability (NAL) issued on March 13, 1992, for six thousand two hundred and fifty dollars ($6,250) against Corpus Christi Media Partners, L.P. licensee of Station KRYS(FM), Corpus Christi, TX. To date, Corpus Christi Media Partners, L.P. has not submitted a response to the NAL and has not paid the forfeiture.

2. The NAL was issued to Corpus Christi Media Partners for its apparent willful violation of Section 1304 and Section 73.1211 of the Commission's Rules. The Commission determined that the licensee of Station KRYS(FM) aired a broadcast that promoted a lottery. The facts are set forth in full detail in the NAL, are uncontroverted, and will not be repeated here. Additionally, we have reviewed the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended, and conclude that the amount of forfeiture assessed against Corpus Christi Media Partners in this proceeding is justified.

3. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Corpus Christi Media Partners, licensee of Radio Station KRYS(FM), Corpus Christi, TX, FORFEIT to the United States of America six thousand two hundred fifty dollars ($6,250) for its violation of Section 73.1211 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to this Memorandum Opinion and Order, a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMPETITIVE TELECOMMUNICATIONS ASSOCATION, ET AL.,
Complainants,

v. File No. E-89-395

CENTRAL TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: July 22, 1992; Released: July 29, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1989, the Competitive Telecommunications Association, Inc. (CompTel), on the behalf of certain of its members, filed with the Commission the above-captioned formal complaint seeking recovery of damages for defendant's alleged overearnings on interstate access services for the period October 1, 1985 through December 31, 1986. On November 6, 1989, the defendant filed an Answer in which it stated, *inter alia*, that it had settled with certain of the members of CompTel and had not provided interstate access service to the remaining members joining in the complaint. On July 13, 1992, CompTel moved to dismiss the above-captioned complaint because its members either had settled with or had not purchased interstate access service from the defendant.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complainant's Motion to Dismiss, filed on July 13, 1992, IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED with prejudice and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY, L.P.,
Complainant,

v. File No. E-90-286

UNITED TELEPHONE COMPANY
OF OHIO, INC.,
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: July 22, 1992; Released: July 29, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Charter Network Company, L.P. ("Charter") filed with the Commission the above-captioned formal complaint against United Telephone Company of Ohio, Inc. ("United") seeking recovery of damages for United's alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. On July 13, 1992, however, Charter filed a motion for leave to withdraw the complaint, stating that it does not wish to pursue its claims against United.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934 as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Charter's Motion for Leave to Withdraw Complaint IS GRANTED and that the above-captioned proceeding IS TERMINATED.

4. IT IS FURTHER ORDERED that Charter's Application for Review filed in the above-captioned proceeding IS DISMISSED.

[1] Charter filed an application for review of an order holding the above-captioned proceeding in abeyance. *Order* 6 FCC Rcd 643 (Com.Car.Bur. 1991). Because the underlying dispute has been resolved by agreement between the parties, the application for review is moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY, L.P.,
Complainant,

v.

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-276
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-277
PACIFIC NORTHWEST BELL TELEPHONE COMPANY, and	File No. E-90-278
CINCINNATI BELL TELEPHONE COMPANY, Defendants.	File No. E-90-282

ORDER

Adopted: July 22, 1992; Released: July 29, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Charter Network Company, L.P. ("Charter") filed with the Commission the above-captioned formal complaints against Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, Pacific Northwest Bell Telephone Company and Cincinnati Bell Telephone Company ("Defendants") seeking recovery of damages for the Defendants' alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. On July 20, 1992, however, Charter filed motions for leave to withdraw the complaints, stating that it does not wish to pursue its claims against the Defendants.

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934 as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Charter's Motions for Leave to Withdraw Complaints ARE GRANTED and that the above-captioned proceedings ARE TERMINATED.

4. IT IS FURTHER ORDERED that Charter's Applications for Review filed in the above-captioned proceedings ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] Charter filed applications for review of an order holding the above-captioned proceedings in abeyance. *Order* 6 FCC Rcd 643 (Com.Car.Bur. 1991). Because the underlying dispute has been resolved by agreement between the parties, the applications for review are moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-413

In the Matter of

Provisions for Introducing Modular
Personal Computers and for
Facilitating Upgrades of Digital
Devices

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: July 1, 1992; Released: July 30, 1992

Comment Date: October 21, 1992
Reply Comment Date: November 13, 1992

By the Commission:

INTRODUCTION

1. This *Further Notice of Proposed Rule Making* proposes to amend Parts 2 and 15 of the rules to better accommodate the introduction of modular personal computer designs.[1] Manufacturers are increasingly employing modular personal computer designs that allow major components, such as the central processing unit (CPU) board and power supply, to be selected by the purchaser. We are proposing to eliminate the need for manufacturers to obtain authorization for every combination of CPU board and power supply within their product lines, provided the components are individually authorized. This will provide manufacturers with increased flexibility while continuing to ensure compliance of personal computers with our standards.

BACKGROUND

2. The Commission's rules require Class B personal computers to be authorized under the FCC certification procedure before they are marketed or imported.[2] The certification requirement is intended to ensure that personal computers comply with the applicable FCC technical standards for limiting radio frequency (RF) noise. The grant of certification is issued for the specific combination of CPU board, power supply and enclosure marketed together as a personal computer. The Commission has not set technical standards or equipment authorization requirements for computer components or subassemblies because, historically, such subassemblies have been used only by manufacturers to assemble computers that were already subject to such requirements.

3. The International Business Machines Corporation ("IBM") and the Computer and Business Equipment Manufacturers Association ("CBEMA") petitioned the Commission to require that CPU boards comply with the Part 15 digital device standards and equipment authorization requirements.[3] IBM, in its petition, stated that technological developments in the design and manufacture of computers have begun to change the way consumers acquire and upgrade computers. Specifically, it indicated that CPU boards used in computers are now available directly to consumers as separately-marketed, interchangeable plug-in boards. IBM expressed concern that the rules unintentionally permit such CPU boards to be marketed to consumers for combination with separately-purchased base units without requiring either the CPU board or base unit to meet our technical standards.[4] CBEMA, in its petition, asked the Commission to clarify its intended regulatory treatment of CPU boards that may be sold to upgrade the operating or processing speed of a computer.

4. In response to the petitions from IBM and CBEMA, the Commission adopted the *Notice of Proposed Rule Making* in this proceeding on September 4, 1990. In the *Notice* the Commission recognized that its existing requirement for computer manufacturers to test and seek authorization for every combination of CPU board, power supply, and enclosure is expensive and time consuming, and may limit equipment design flexibility by discouraging manufacturers from introducing new products.[5] The Commission indicated its desire to modify its rules to provide industry with the flexibility to advance new designs and construction techniques for personal computers. It also cautioned that this flexibility must be balanced against the need to maintain effective control of the interference potential of computers and other digital devices. Accordingly, the Commission proposed to make CPU boards subject to the same testing, authorization, labelling and other requirements applicable to computer peripheral devices.[6] This proposal would have permitted anyone to install an authorized CPU board in a certified computer system, without further testing or authorization. The Commission further proposed to allow manufacturers and importers six months to bring their CPU boards into compliance. In

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[1] Based on the responses to the *Notice of Proposed Rule Making* (*Notice*) in this proceeding, the Commission has revised its initial proposals for addressing this matter. *See Notice of Proposed Rule Making*, GEN Docket No. 90-413, 5 FCC Rcd 5652 (1990).

[2] *See* 47 CFR Sections 2.803, 2.1203 and 15.101. The Commission's certification procedure is set forth in 47 CFR Sections 2.901, *et seq*. Under the Commission's rules, Class B personal computers are computers marketed for use in a residential environment. *See* 47 CFR Section 15.3(i) and (s).

[3] *See* Petition for Reconsideration filed by IBM on May 26, 1989, and Petition for Limited Reconsideration filed by CBEMA on May 26, 1989, in response to the *First Report and Order*, GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989). Since the issues raised in the IBM and CBEMA petitions were not addressed in that *First Report and Order*, they were considered in this separate proceeding.

[4] A computer base unit consists of the enclosure, power supply and, possibly, other components.

[5] In some cases, the cost of obtaining a grant of certification for a personal computer, including testing, can exceed $5,000.00. This cost can be prohibitive for a system assembler, such as a retailer, that assembles and markets computers in small quantities.

[6] Peripheral devices include devices that attach external to a computer, devices internal to a computer that connect the computer to an external device by wire, and devices that are used to increase a computer's operating or processing speed.

response to the *Notice*, 27 parties filed comments and 8 parties filed replies to comments. These commenting parties are listed in Appendix B.

5. *Comments on the Notice*. While the majority of the commenting parties support the intent of the *Notice*, they also raise a number of additional issues concerning our approach for achieving our objectives. Many of these parties oppose our proposal to regulate CPU boards as peripheral devices.[7] They argue that testing CPU boards in a single typical computer system configuration, as is done for peripheral devices, would not adequately ensure system compliance with the technical standards if the CPU board were installed in a different computer than the one in which it was originally tested. They state that the ability of a computer system to comply with the technical standards depends upon a complex interaction of all of the subassemblies used within the system. Further, they indicate that the shielding, grounding and filtering techniques used in the design of a computer system are critical in determining whether the system complies with FCC standards. To address these concerns, many commenters suggest other testing methods that they believe would provide better assurance that a computer system containing a separately-authorized CPU board would comply with the standards. For example, several parties request that CPU boards be tested without an enclosure. [8] Some also suggest that the Commission restrict the marketing or installation of separately-authorized CPU boards to computers with which they have been tested.[9] Others submit that individual CPU boards should be tested in every possible computer with which they are compatible.[10]

6. Several commenting parties recommend that the Commission also bring other computer subassemblies under its standards and authorization requirements.[11] In particular, some parties indicate that personal computer power supplies are being marketed directly to consumers and should also be subject to the Commission's standards and authorization requirements. Compaq, Memorex, and others express concern that our proposal to permit CPU boards to be installed in any certified computer system would give system assemblers an unfair advantage over computer system manufacturers, who must test and obtain certification for each computer system they sell.[12]

DISCUSSION

7. We continue to believe that it is important for our rules to recognize the changes that have occurred in the design and marketing of personal computers. However, in view of the comments filed in response to the *Notice* we are concerned that our original proposal to allow CPU boards to be regulated in the same manner as peripheral devices would not represent the best approach for achieving our objectives. Most notably, it appears that the plan proposed in the *Notice* would not provide adequate assurance that a certified CPU board would comply when installed in a variety of host computer systems. Accordingly, we have developed a revised approach that we believe will provide the necessary assurance that personal computers comply with the FCC technical standards and also provide manufacturers flexibility in designing modular computer systems. In view of the fact that our revised approach is a substantial departure from our original plan and the importance of these issues to the personal computer industry, we believe it is appropriate that we provide opportunity for additional comments on this matter.

General Issues

8. *Findings*. Based on the comments, we continue to believe it is practicable to reduce the regulatory burden on manufacturers of modular personal computer systems, whereby every combination of CPU board and power supply, and in some cases other components, must be separately authorized. At the same time, we recognize that testing and authorizing the individual components would not provide complete assurance that the computer assembled from these components will comply with our standards. It appears, however, that the manufacturer of a given modular personal computer is in a position to minimize this risk. The manufacturer is familiar with the design of all of the components it offers for use in its modular personal computer system and is aware of how they interact. Moreover, the manufacturer, as the party responsible for all of the components, can clearly be held accountable for compliance of completed systems. In light of these considerations, we believe it is reasonable to provide manufacturers flexibility to mix the various CPU boards, power supplies and other components used in their product line of certified personal computer systems. In contrast, it appears that the risks of non-compliance are considerable where a computer is assembled from components by parties who do not have experience using those components to produce a computer system that fully meets our technical standards. Moreover, it would be extremely difficult to determine which component, and therefore which party, is responsible if non-compliance occurs.

9. Further, we are now persuaded that power supplies should be given the same regulatory attention as CPU boards. The primary cause of non-compliance with our power line conducted emissions below 30 MHz is the computer power supply. Thus, authorizing CPU boards,

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Examples of peripheral devices include monitors, keyboards, printers, and some internal cards such as printer interface cards and video cards. *See* 47 CFR Section 15.3(r). Peripheral devices used with personal computers are required to be authorized under our certification procedure. *See* 47 CFR Section 15.101(a).

[7] See comments filed by Amador, AT&T, CKC, Compaq, DLS, EMC Engr., Metrum, Tandon, Tandy, TKC, and Zenith.

[8] See comments filed by Amador, CKC, Compaq, and Memorex.

[9] See comments filed by AT&T and Compaq.

[10] See comments filed by Commodore, DLS, and EMC Engr.

[11] See comments filed by ALR, AST, AT&T, Daewoo, IBM, Intel, NECTECH and WDC. Subassemblies referenced by the commenting parties include power supplies and enclosures.

[12] See comments filed by Carl T. Jones, Compaq, Memorex, NECTECH, and Tandy. System assemblers, unlike manufacturers, assemble computer systems using components that have already been authorized. Under the rules proposed in the *Notice*, system assemblers would not have been required to test the resulting system for compliance, nor would they have been required to obtain any additional authorization from the Commission.

without similarly authorizing power supplies, would provide little assurance that a computer assembled from them would satisfy our power line conducted emissions limits.

10. *Framework of the new proposal.* In balancing the above concerns, we have developed the following proposal. We propose to require all CPU boards and power supplies designed for use in personal computers and marketed to the public to be certified as complying with our technical standards. We would allow manufacturers of modular computer systems to obtain authorization of CPU boards and power supplies, and to interchange these components in their own certified personal computer systems without the need to obtain a separate certification for every combination of components. Furthermore, if a system manufacturer obtains a certified component from another party and receives certification for a computer system containing that component, we would also allow the system manufacturer to interchange the component in all of their own certified computer systems. In either case, the system manufacturer would be required to verify that the various combinations comply.[13] These changes would reduce the number of certification applications that a manufacturer must submit for a modular computer system.[14]

11. Several commenters suggest that we allow any party to assemble computers using certified components without further testing or certification. Some parties suggest that CPU boards be certified for use with specific host computers. As stated above, we believe the risk that the resulting computer systems would cause interference would be too great. Moreover, keeping track of all the authorized combinations would represent an enormous administrative burden and would severely complicate enforcement. For example, we would not only need to check that each component was authorized, but also that the particular combination being marketed had been authorized. We also agree with those comments stating that such an arrangement would create an unlevel playing field, whereby some manufacturers would have to obtain Commission certification for complete personal computers, while others could construct computers from authorized components without obtaining authorization for the complete system. Comments are invited on this new proposal.

Specific Issues

12. *Definitions.* We note IBM's comments stating that the Commission should adopt a definition of a modular personal computer system and limit the proposed flexibility to mix components only to such systems. We believe IBM's concern was driven primarily by the aspect of our original proposal to allow mixing of various manufacturer's components without further authorization. Such a definition does not appear necessary given our new proposal. We also note that AT&T requests that the definition of a CPU board proposed in the *Notice* be modified.[15] In response, we now propose to define a CPU board as follows:

> A circuit board that contains a microprocessor, or frequency determining circuitry for the microprocessor, the primary function of which is to execute user-provided programming, but not including: (1) a circuit board that contains only a microprocessor intended to operate under the primary control or instruction of a microprocessor external to such a circuit board; or, (2) a circuit board that is a dedicated controller for a storage or input/output device.[16]

We are retaining our proposal from the *Notice* to delete the reference to control cards from the list of examples in the definition of a peripheral device.[17] Comments are invited on these proposed definitions.

13. *Marketing and importation of non-certified CPU boards and power supplies.* We propose to continue our policy of permitting non-certified digital devices, including CPU boards and power supplies, to be sold to other manufacturers for further fabrication. In such cases, the final manufacturer would be responsible for testing the product and obtaining certification. However, to ensure that non-certified CPU boards and power supplies are not (sold to other parties that may install them in computer systems without further testing and authorization, we propose to restrict the sale of non-certified CPU boards and power supplies to manufacturers that have been issued a grant of certification for a personal computer system that uses the CPU board or power supply being marketed.[18] Similarly, we propose to amend our importation rules to require that, when non-certified CPU boards and power supplies are imported, the consignee must be the holder of the grant of certification for the personal computer into which these components are to be installed. The FCC Identifier corresponding to the personal computer into which these components are to be installed would also be required to be provided to the Commission at the time of importation.[19] Comments are requested on these proposals.

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[13] *See* 47 CFR Sections 2.902 and 2.951-2.957.

[14] As the party assembling the computer is the grantee for the original computer as well as, in most cases, the components used to upgrade or modify the computer, it continues to be responsible for ensuring that the resulting system complies with the standards. *See* 47 CFR Section 2.909.

[15] AT&T requests that the definition of a CPU board be amended to: 1) define the CPU board as a digital device; 2) include circuit boards that contain the clock circuitry associated with the microprocessor; and, 3) define the CPU board based on the primary function of the microprocessor and clock circuitry.

[16] Similar to the definition of a CPU board that was proposed in the *Notice*, the revised definition excludes peripheral devices and products such as math co-processors. These products would continue to be regulated as under the current rules. However, "accelerator" boards, "turbo" cards and "enhancement" boards that replace a CPU board would be defined as CPU boards. "Accelerator" boards, "turbo" cards and "enhancement" boards that operate in conjunction with an existing CPU board continue to be defined as peripheral devices. We are not proposing to define the CPU board as a digital device, as also suggested by AT&T. Implementing AT&T's suggestion could exclude those circuit boards that contain the microprocessor, but not the clock circuitry.

[17] *See* 47 CFR Section 15.3(r).

[18] We recognize that manufacturers of CPU boards and power supplies may need to provide their products to computer system manufacturers for testing, evaluation or product development purposes before system certification is obtained. We propose to allow such marketing in limited quantities.

[19] This information is to be included on FCC Form 740.

14. *Required testing.* As noted earlier, several respondents to the *Notice* raised concerns about our proposal to treat CPU boards in the same manner as peripherals with regard to testing, *i.e.*, test a CPU board in a single, representative personal computer configuration.[20] These concerns arose because we proposed to allow the CPU board to be installed without restriction in any certified personal computer system. Since our further proposal deletes this provision, we believe the concerns of the commenters on this issue should be alleviated. We invite comment on this tentative conclusion.

15. *Accessories required for compliance.* Some commenting parties request that the Commission allow special add-on parts or accessories, such as ferrite beads, to be provided with the CPU board or power supply in order to achieve compliance with our emission limits. In general, we believe manufacturers should design modular personal computer systems such that there is no need for such additional accessories. However, the existing rules already allow the use of special accessories for other certified devices and we are proposing to apply the same requirements to CPU boards and power supplies.[21] Any special steps required to ensure compliance must be explained in the installation instructions, a copy of which must be furnished with the application for certification. We will not authorize any CPU boards or power supplies that require complex electrical changes to the host system, such as by soldering parts or altering circuitry.

16. *Labelling.* We are maintaining the proposal in the *Notice* to require CPU boards, and now power supplies, to be labelled with an FCC Identifier, consistent with our normal certification requirements.[22] However, we observe that several commenting parties request that certified CPU boards be marketed with a separate, stick-on label containing the FCC Identifier. This label would be placed on the computer's enclosure following installation of the CPU board. We agree that this would be beneficial by permitting the identification of the CPU board or power supply without opening the computer cabinet. Therefore, we have incorporated this suggestion in our new proposal. To avoid possible confusion between various FCC Identifiers that may appear on the computer, we propose to require that the labels indicate whether the FCC Identifier applies to a CPU board or a power supply.[23] Comments are invited on this aspect of our proposal.

17. *Transition provisions.* In the *Notice*, we proposed to require that all digital devices manufactured, imported or marketed on or after six months from the date final regulations are published in the Federal Register must comply with the rules adopted in this proceeding. CBEMA, IBM and Tandy object to this proposed transition period, requesting that we extend the transition period or permit devices manufactured, imported or marketed before the end of the transition period to continue to be manufactured, imported and marketed indefinitely. Given our new proposal, we request additional comments on the transition provisions.[24]

18. *Changes in the microprocessor or frequency determining circuitry.* Several manufacturers are currently designing CPU boards that may be upgraded by replacement of the microprocessor circuit or the clock module rather than the entire CPU board. This allows the same computer to be easily upgraded to higher processing or clock speeds. Under the current rules, any change to the basic frequency-determining circuitry is considered to be a major modification requiring the issuance of a new grant of certification before the modified product may be marketed.[25] Consistent with our proposal to permit flexibility design and construction of personal computers, we also propose to amend the rules to permit changes to the basic frequency-determining circuitry in digital devices as a Class II permissive change.[26] This would allow a grantee to replace the frequency-determining circuitry in a CPU board, a peripheral device or any other digital device without having to obtain a new grant of certification.

Alternative Proposal

19. While we believe that the above proposal achieves the best balance among the various concerns, we recognize that it does not provide the complete freedom to mix components that we currently permit for peripherals. We therefore seek comment on an alternative approach whereby CPU boards would be subject to more specific testing and technical standards in order to provide the required assurance that personal computers assembled from them

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[20] The test procedures and test configurations are contained in FCC/OET MP-4, "FCC Procedure for Measuring RF Emissions from Computing Devices," July 1987, and ANSI C63.4-1991. Effective May 1, 1994, MP-4 may no longer be employed. *See* 47 CFR Section 15.31(a) and *Report and Order*, GEN Docket No. 89-44, 7 FCC Rcd 3128 (1992). The CPU board or power supply would be configured as described in this procedure using a host computer that is considered to be typical of the type within which the product would normally be installed.

[21] *See* 47 CFR Section 15.27.

[22] The FCC Identifier on a certified device must be etched, silkscreened or otherwise permanently affixed to the device. *See* 47 CFR Section 2.925(d)(1). We will not permit the use of paper, stick-on FCC Identifier labels. Such labels generally do not adhere well to printed circuit boards and would not be expected to last the lifetime of the equipment, as required under the rules.

[23] For example, the label placed external on the computer would state "This computer contains the following CPU board: FCC ID" followed by the FCC Identifier for the installed CPU board.

[24] We wish to clarify that we intend to grandfather computers that have already been certified by the Commission. We will continue to permit personal computers to be certified as a system based on the specific combination of CPU board, power supply and enclosure used in their construction. Manufacturers of these computers may obtain separate certification for the individual components at a later date.

[25] *See* 47 CFR Section 2.1043(a). We have allowed, however, an applicant to obtain certification for a CPU board employing a replaceable clock circuit provided the applicant indicates in its initial application all possible clock modules that may be employed. Subsequent changes to the frequency determining circuitry, such the development of a new clock module, requires application for and issuance of a new grant of certification. Substitution of the microprocessor circuit is a Class II permissive change provided this substitution does not also entail a change to the clock circuitry.

[26] *See* 47 CFR Section 2.1043(b)(2). Under a Class II permissive change the grantee must file new measurement information with the Commission and obtain approval before the modified device may be marketed. We are not proposing to apply this change to other Part 15 devices. Currently, we are not aware of any products, other than digital devices, that are being designed to permit modular changes to the frequency determining circuitry.

will meet our technical standards. We could therefore permit reduced regulation for personal computers assembled from certified components. Specifically, under this alternative a CPU board would be tested both in a typical configuration and without an enclosure.[27] This proposal is somewhat in line with those comments suggesting testing without an enclosure. We believe testing of power supplies in a typical configuration should be sufficient and are not proposing additional testing for power supplies.

20. One difficulty under this alternative proposal is the problem of determining the party responsible for compliance. For example, it is feasible that a given CPU board will comply when used with numerous power supplies and cabinets, but may not comply for some. Because the noncompliance may be due to the interaction of components, it may not be clear whether the CPU board or power supply is at fault. To alleviate this problem, we would require that the assembler obtain FCC notification for a computer consisting of authorized components.[28] The assembler receiving notification would be responsible for compliance of the system. We believe the end result of this approach would be a substantial reduction in the number of certification applications for personal computers. Notification is a more expeditious and economical procedure than certification. Comments are invited on this alternative proposal and whether the benefits outweigh the complexities. Comments are specifically requested on the viability of testing CPU boards without an enclosure, and the issue of responsibility for compliance. We also solicit any other proposals for treating the issues raised in this proceeding.

PROCEDURAL MATTERS

21. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

22. *Initial Regulatory Flexibility Analysis.* As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Further Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

23. *Comment Dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comment on or before **October 21, 1992** and reply comments on or before **November 13, 1992.** To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

24. The proposed action is authorized under Sections 4(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307.

25. For further information regarding this *Further Notice of Proposed Rule Making,* contact John Reed, Office of Engineering and Technology, (202) 653-6288.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

This rule making proceeding is initiated to obtain comment regarding whether and how the Commission should regulate subassemblies to personal computers.

Objectives

The Commission seeks to determine the standards, test procedures, and equipment authorization requirements that should be applied to CPU boards and power supplies used in personal computers in order: 1) to reduce the potential for interference to radio services by improving

[27] Only radiated emissions would be measured when testing without an enclosure. Furthermore, to avoid testing difficulties, we would require that the CPU board be connected only to the power supply without the addition of peripheral devices. The oscillator circuit for the microprocessor must, however, be operating, with the output coupled to the microprocessor circuit, as would occur under normal operation. If the oscillator and microprocessor circuits are contained on separate circuit boards, both boards, typical of the combination that would normally be employed, would be used in the tests.

[28] Each specific combination of CPU board, power supply and enclosure would require a separate grant of notification. In light of the more specific testing procedure for CPU boards we would eliminate the requirement to test the resulting personal computer system. Instead, the system assembler would be required to attest that it has followed any special installation instructions provided by the manufacturers of the certified components and to provide the FCC Identifiers for all of the components used in the construction of the personal computer system.

our ability to ensure that personal computers comply with our standards; 2) to reduce regulatory burdens on computer manufacturers; and, 3) to remove impediments to flexible system design and construction techniques for personal computers.

Legal Basis

The proposed action is authorized under Sections 4(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307.

Reporting, Recordkeeping and Other Compliance Requirements

CPU boards and power supplies designed for use in personal computers, which were not previously subject to our rules, are proposed to be included under our standards and authorization requirements. In addition, we propose to permit a manufacturer with a product line of certified personal computers to interchange CPU boards and power supplies provided it has obtained certification for those CPU boards and power supplies and verifies the resulting equipment combination. The impact of the requirements on CPU boards and power supplies will be substantially reduced by permitting use of the verification procedure for computers that are assembled by manufacturers from their previously-authorized CPU boards and power supplies. Thus, we do not expect any significant increase or decrease in the overall recordkeeping requirements.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules

None

Description, Potential Impact and Number of Small Entities Involved

The actions proposed in this proceeding will increase the number and type of digital components subject to our standards, testing and equipment authorization requirements. On this basis alone, the workload and filing requirements may increase, both to large and small entities. However, as these changes to the rules will obviate the need for some manufacturers to obtain certification for every possible configuration of personal computer systems produced in its product line, it is possible that the overall workload will remain unchanged. Still, some small entities that manufacture only CPU boards or power supplies may find that they are now subject to our standards whereas under the current rules their devices were not regulated. We estimate there are 50-75 manufacturers of CPU boards and a similar number of manufacturers of power supplies.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with Stated Objectives

As an alternative to requiring all personal computers to be certified or verified, we propose to apply a more specific testing procedure to CPU boards. Further, if a personal computer is constructed from certified components and is marketed, the assembler would be required to obtain a grant of notification from the Commission for that specific product configuration. However, no additional testing would be required to obtain the grant of notification, resulting in a significant decrease in the overall workload required for manufacturers and system assemblers.

APPENDIX B

Comments on GEN Docket No. 90-413 were received from the following:

Advanced Logic Research, Inc. (ALR)

Amador Corporation (Amador)

American Telephone and Telegraph Company (AT&T)

Bull HN Information System, Inc. (Bull HN)

Carl T. Jones Corporation

CKC Laboratories, Inc. (CKC Labs)

Commodore Business Machines, Inc. (Commodore)

Compaq Computer Corporation (Compaq)

Computer and Business Equipment Manufacturers Association (CBEMA)

Daewoo Telecom Ltd. (Daewoo)

DLS Electronic Systems, Inc. (DLS)

EMC Engineering (EMC Engr.)

Intel Corporation (Intel)

International Business Machines Corporation (IBM)

International Compliance Corporation (ICC)

Memorex Telex Corporation (Memorex)

Metrum Information Storage (Metrum)

NEC Technologies, Inc. (NECTECH)

PCTEST Engineering Laboratory, Inc. (PCTEST)

Rhein Tech Laboratories, Inc.

Rockford Engineering Services (Rockford)

Spectrum Measurement Corporation

Tandon Corporation (Tandon)

Tandy Corporation (Tandy)

The Keenan Corporation (TKC)

Western Digital Corporation (WDC)

Zenith Data Systems (Zenith)

Reply Comments on GEN Docket No. 90-413 were received from the following:

Advanced Logic Research (ALR)

Amador Corporation (Amador)

American Telephone and Telegraph Company (AT&T)

AST Research, Inc. (AST)

Daewoo Telecom Ltd. (Daewoo)

Memorex Telex Corporation (Memorex)

Scientific-Atlanta

Tandy Corporation (Tandy)

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-152

In the Matter of

Revision of Part 15
of the Rules to harmonize
the standards for digital
devices with international standards.

NOTICE OF PROPOSED RULE MAKING

Adopted: July 10, 1992; Released: July 30, 1992

Comment Date: October 21, 1992
Reply Comment Date: November 13, 1992

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to amend Part 15 of its rules to permit the manufacturers of digital devices to demonstrate compliance with either FCC requirements or international standards for radio frequency emissions. The objective of this proposal is to ensure that U.S. manufacturers have reasonable opportunities to compete fairly and effectively in the international marketplace.

BACKGROUND

2. Part 15 of the Commission's rules governs the operation of radio frequency (RF) devices without an individual license. Digital devices, such as computers, generate and use RF energy. These devices are subject to the provisions contained in Part 15 limiting radio noise emitted by unintentional radiators.[1] Part 15 was recently revised to establish uniform standards for unintentional radiators.[2]

3. The standards in Part 15 apply only to products used in the United States. Many other countries, most notably the European community countries, are in the process of requiring digital devices to comply with standards developed by the International Special Committee on Radio Interference (CISPR) for controlling interference.[3] CISPR is a voluntary standards-making organization under the auspices of the International Electrotechnical Commission (IEC). CISPR adopts recommendations for limits and methods of measurement to control radio interference generated by computers and various other devices. CISPR Publication 22 contains limits and methods of measurements for Information Technology Equipment, which includes the same equipment that the FCC defines as digital devices. CISPR has been considering several changes to its standards on digital devices, and release of a new Publication 22 is expected in the near future.[4]

4. In Petitions for Reconsideration of the *Report and Order* adopting the new Part 15 rules, the Computer and Business Equipment Manufacturers Association (CBEMA) and NCR Corporation (NCR) asked the Commission to harmonize its technical standards for digital devices with the international standards contained in CISPR Pub. 22.[5] CBEMA indicates that many members of the computer industry have developed multi-national markets. It submits that these companies must comply with the CISPR standards for equipment marketed in European and the Far East. These same companies must also demonstrate compliance with the Commission's standards for equipment marketed within the U.S. To reduce design and testing burdens and costs, CBEMA and NCR urge the Commission to conform its standards for digital devices to the CISPR standards.[6] Alternatively, CBEMA requests that the Commission accept demonstration of compliance with the CISPR standards in lieu of compliance with the Commission's limits.[7]

5. In a separate matter, CBEMA also requests that Part 15 be amended to reflect the 13 dB relaxation of the emissions limits for broadband emissions conducted onto the AC power lines that is specified in the Commission's measurement procedures. The regulations specify limits on

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[1] *See* 47 CFR Section 15.3(z) and 47 CFR Sections 15.107-15.117.

[2] *See First Report and Order*, GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989) (*"Report and Order"*).

[3] Japan also has adopted voluntary standards based on CISPR recommendations, and other countries are in the process of aligning their requirements with the CISPR standards.

[4] CISPR Pub. 22 was first printed in 1985. Since then several amendments to CISPR Pub. 22 have been adopted after having been published as Draft International Standards (DISs) -- see documents CISPR/G (Central Office) 2, CISPR/G (Central Office) 9, CISPR/G (Central Office) 11, CISPR/G (Central Office) 12, CISPR/G (Central Office) 13, and CISPR/G (Central Office) 14. It is expected that these changes will be incorporated into a new Second Edition of CISPR Pub. 22, which should be released in the near future. The First Edition of CISPR Pub. 22 and the above documents are available for purchase from: the American National Standards Institute (ANSI), Sales Department, 11 West 42nd Street, New York, NY 10036, (212) 642-4900. Copies of CISPR Pub. 22 and the above documents will be placed into the record and may be inspected (but not duplicated) during normal business hours at the Federal Communications Commission, Office of Engineering and Technology, 2025 M Street NW, Room 7317, Washington, DC.

[5] In a *Memorandum, Opinion and Order* addressing petitions for reconsideration of the *Report and Order*, the Commission indicated that it would address harmonization of its standards in a future proceeding. *See Memorandum, Opinion and Order*, GEN Docket No. 87-389, 6 FCC Rcd 1683 (1991) (*"MO&O"*).

[6] The CISPR Pub. 22 standards were derived from FCC requirements that were first adopted in 1979. *See First Report and Order - Technical Standards for Computing Equipment*, Docket No. 20780, 44 Fed. Reg. 59530, October 16, 1979. Although FCC staff and other U.S. representatives actively participate in the CISPR standards-making process, the standards in CISPR Pub. 22 have, over the years, been amended to meet changing international requirements.

[7] CBEMA's petition suggests that compliance with the CISPR standards be accepted as *de facto* compliance with the Part 15 requirements. However, as discussed below, some of the CISPR standards are more lenient than the Part 15 requirements. Thus, we believe CBEMA meant that compliance with the CISPR standards be considered as an acceptable alternative to compliance with the Part 15 requirements.

emissions conducted onto the AC power lines over the frequency band 450 kHz to 30 MHz.[8] Testing to this standard is performed using a CISPR quasi-peak detector.[9] However, the Commission's measurement procedures permit a 13 dB increase in the emission limit if the difference between the emission levels measured with a quasi-peak detector and with an average detector is 6 dB or greater.[10] This relaxation to the AC power line conducted limits is not contained in the regulations.

DISCUSSION

6. We concur with CBEMA and NCR that harmonization of the U.S. standards for digital devices with the standards in CISPR Pub. 22 could be advantageous for many equipment manufacturers. Harmonization would permit products manufactured for sale within the U.S. to be marketed in those countries following the CISPR specifications, with minimal additional testing and product design modifications.[11]

7. We propose to harmonize our digital device standards with those in CISPR Pub. 22, as amended, by revising Part 15 to state that we will accept a demonstration of compliance with the CISPR Pub. 22 standards in lieu of compliance with the Part 15 standards. In general, the CISPR standards are somewhat more stringent than the current Part 15 standards.[12] Thus, the CISPR standards should be adequate to ensure that digital devices do not cause harmful interference to authorized radio services. Allowing manufacturers to demonstrate compliance with either the existing FCC standards or the CISPR standards should be possible without substantial changes by manufacturers of digital devices to the design of their products. Thus, changing the regulations in this manner would be least disruptive to equipment manufacturers. It would also provide the desired benefits of reducing design and testing burdens and, at the same time, serve the Commission's interference control objectives. Comments are invited on the suitability of this approach and on any possible increased interference concerns for those CISPR standards that are less stringent than the Part 15 standards. Comments are also invited on the suitability of the measurement procedures contained in CISPR Pub. 22 and whether we should require that CISPR Pub. 22 measurements be made using the measurement procedures currently specified in our rules.

8. We are reluctant to amend Part 15 to specify the CISPR Pub. 22 standards as mandatory for all digital devices. While amending Part 15 in this manner would avoid possible confusion by ensuring that all digital devices are designed to comply with the same limits, the existing limits appear to be adequate for products used within the U.S. Further, many digital devices are not marketed internationally, yet the manufacturers would be forced to comply with the more stringent CISPR standards under this method of regulation. We also do not wish to return to regulations that apply different standards to different Part 15 devices, as existed prior to finalization of the *Report and Order* in GEN Docket No. 87-389.[13] The former Part 15 rules were confusing and inconsistent and subjected different products to different standards even though the products had the same potential for causing interference to other radio operations.

9. We are also reluctant to amend the general emission standards applicable to all Part 15 devices to conform to the standards in CISPR Pub. 22. This method of regulation would maintain uniformity of the Part 15 standards. However, we do not believe that more stringent standards are needed in Part 15 to reduce interference to the authorized radio services. We note, in particular, that it has only been a little more than three years since the Part15 regulations and limits were completely reviewed and modified in GEN Docket No. 87-389. The adoption of further changes to the emission standards at this time would have a major impact on hundreds of Part 15 products, imposing an unnecessary economic burden on a significant number of manufacturers and, consequently, on the public as well. Further, while the adoption of the CISPR Pub. 22 standards may promote the international trade of digital devices, this is not necessarily applicable to other Part 15 devices. Accordingly, we do not believe that such a major revision to the general standards in Part 15 is justified at this time.

Implementation:

10. While we are proposing to amend the rules to permit compliance with either CISPR Pub. 22 or Part 15 standards, we are concerned that the CISPR standards do not specify limits for radio frequency emissions above 1000 MHz. We believe that the existing FCC limits for emissions above 1000 MHz need to be maintained in order to protect against potential interference to existing and planned radio services above 1000 MHz. We observe that the clock frequencies used in digital devices are increasing, with a resulting increase in emissions at higher frequencies. Thus, we also propose that, when necessary, manufacturers of digital devices must continue to demonstrate compliance with the current Part 15 emission limits above 1000 MHz.[14] Further, for emissions below 1000 MHz we propose that manufacturers of digital devices be required to demonstrate complete compliance with either the

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[8] *See* 47 CFR Section 15.107.

[9] *See* 47 CFR Section 15.35.

[10] This 13 dB allowance is provided because of the difference in interference potential between broadband and narrowband emissions. *See* "FCC Procedure for Measuring RF Emissions from Computing Devices," FCC/OET MP-4, July 1987, Section 4.2.2, Note 2, and ANSI C63.4-1991. Effective May 1, 1994, MP-4 may no longer be employed. *See* 47 CFR Section 15.31(a) and *Report and Order*, GEN Docket No. 89-44, 7 FCC Rcd 3128 (1992).

[11] We note, however, that the use of different power line voltages and frequencies in some countries requires changes to the power supply used in the digital device. Substitution with a different power supply or modifications to an existing power supply generally necessitates additional testing.

[12] A detailed comparison of the current FCC limits and the CISPR Pub. 22 limits is provided in Appendix B. The CISPR standards were taken from the First Edition of CISPR Pub. 22 and the adopted amendments listed in footnote 4 above. In general, the CISPR limits are similar or slightly more stringent than the Part 15 standards. They are more lenient only with regard to conducted emissions for one class of equipment (Class A, business and commercial) and for one narrow frequency band (450-500 kHz). Also, the FCC has standards for emissions above 1000 MHz, whereas CISPR does not. However, the FCC Rules do not require emissions above 1000 MHz to be measured unless the digital device generates or uses signals at 108 MHz or higher. *See* 47 CFR Section 15.33(b).

[13] *See* footnote 2, *supra*.

[14] *See* footnote 11, *supra*.

CISPR standards or the Part 15 standards. Intermixing between the FCC standards and the CISPR standards will not be permitted.[15]

11. As described above, we propose to amend Part 15 of the regulations to state that manufacturers of digital devices may, in lieu of demonstrating compliance with the emission standards below 1000 MHz in Sections 15.107 and 15.109, demonstrate compliance with the emission standards in CISPR Pub. 22. Since this change to the regulations should not have an adverse impact on any manufacturer of digital devices, we propose that these changes to the regulations become effective upon the date the resulting Report and Order is published in the Federal Register.[16]

12. CISPR has not yet published its new, amended Pub. 22.[17] Nevertheless, we are making our proposal at this time because developments in Europe and elsewhere regarding computer emissions standards are moving ahead, and we want to be ready to permit manufacturers to quickly take advantage of being able to build computers to a single emissions standard.

Conducted Emissions Standards:

13. We agree with CBEMA that the dual standards for AC powerline conducted emissions from broadband and narrowband emissions should be contained in the regulations and not solely in the measurement procedures. Accordingly, for any Part 15 device, including non-digital devices, we also propose to amend the regulations to indicate that when the difference between the emission levels measured with a quasi-peak detector and an average detector is 6 dB or greater, a 13 dB allowance may be added to the Part 15 powerline conducted limit.

PROCEDURAL MATTERS

14. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

15. *Initial Regulatory Flexibility Analysis.* As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Further Notice of Proposed Rule Making, "including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

16. *Comment Dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comment on or before **October 21, 1992** and reply comments on or before **November 13, 1992.** To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

17. The proposed action is authorized under Sections 4(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307.

18. For further information regarding this *Notice of Proposed Rule Making*, contact John Reed, Office of Engineering and Technology, (202) 653-6288.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

This rule making proceeding is initiated to obtain comment as to whether the Commission should amend Part 15 of its rules to accept a demonstration of compliance with the CISPR Pub. 22 standards for a digital device as an alternative to the demonstration of compliance with the standards contained in Part 15.

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[15] We believe that the relatively few relaxations contained in CISPR Pub. 22 are acceptable only if they are offset by the other more stringent requirements of CISPR Pub. 22.

[16] In accordance with 5 USC Section 553(d), a 30 day period from the time of publication to the effective date is not required.

[17] CISPR continues to consider several additional amendments to Pub. 22. As these changes are developed, they will be published by CISPR as DISs and will be available from ANSI (see footnote 4 above). It should be recognized that such DISs are not always adopted by CISPR. Nevertheless, we invite comment as to whether compliance with such pending changes should be required by the Commission when permitting a manufacturer to comply with CISPR Pub. 22. To ensure that future amendments to CISPR Pub. 22 do not change the standards applicable to digital devices marketed in the U.S. without notice and comment required through rule making, we propose to reference a specific CISPR Pub. 22 edition and specific amendments, if appropriate. We note that CISPR is investigating standards affecting the ability of a digital device to reject unwanted interference (EMC immunity) and the ability of a digital device to withstand static discharges. These changes will be published in a separate CISPR publication, and we are not proposing to implement these portions of the CISPR standards.

Objectives

The objective of this proposal is to facilitate the international marketing of digital devices, particularly computers.

Legal Basis

The proposed action is authorized under Sections 4(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307.

Reporting, Recordkeeping and Other Compliance Requirements

There are no changes to reporting, recordkeeping and other compliance requirements beyond what is already required under the current regulations.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules

None.

Description, Potential Impact and Number of Small Entities Involved

The actions proposed in this proceeding should assure reasonable opportunities for U.S. manufacturers of digital devices to compete fairly and effectively in the international marketplace. There should be no adverse impact on any small manufacturers of these products.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with Stated Objectives

No adverse impact on small entities is expected.

APPENDIX B

COMPARISON OF CURRENT LIMITS WITH CISPR STANDARDS

Based on First Edition of CISPR Pub. 22, as amended by CISPR/G (Central Office) 2, CISPR/G (Central Office) 9, CISPR/G (Central Office) 11, CISPR/G (Central Office) 12, CISPR/G (Central Office) 13, and CISPR/G (Central Office) 14

Limits on AC Powerline Conducted Emissions

Class A Digital Devices

FCC Limits			CISPR Limits	
Frequency (MHz)	Voltage (dBuV) * Quasi-peak	Average	Voltage (dBuV) Quasi-Peak	Average
0.15-0.45	No Limits		79	66
0.45-0.5	60	None	79	66
0.5-1.705	60	None	73	60
1.705-30	69.5	None	73	60

Class B Digital Devices

FCC Limits			CISPR Limits	
Frequency (MHz)	Voltage (dBuV) * Quasi-peak	Average	Voltage (dBuV) Quasi-Peak	Average
0.15-0.45	No Limits		66-56.9 **	56-46.9 **
0.45-0.5	48	None	56.9-56 **	46.9-46 **
0.5-5	48	None	56	46
5-30	48	None	60	50

* The comparison of the FCC and CISPR conducted limits must take into account the differences in measurement procedures. While the FCC does not have a limit on the average value of conducted emissions, the measurement procedures permit the FCC quasi-peak limits to be raised by 13 dB if the difference between quasi-peak and average measurements is 6 dB or greater. Under this condition, the limit for Class B digital devices becomes 61 dBuV (quasi-peak) and 55 dBuV (average, representing the minimum 6 dB difference). Similarly, for Class A devices the limits become 73 dBuV (quasi-peak) and 67 dBuV (average) for the band 0.45-1.705 MHz and 82.5 dBuV (quasi-peak) and 76.5 dBuV (average) for the band 1.705-30 MHz.

** The limit decreases linearly with the logarithm of the frequency.

Limits on Radiated Emissions

Class A Digital Devices

FCC Limits *		CISPR Limits *
Frequency (MHz)	Field Strength (dBuV/m) @10m	Field Strength (dBuV/m) @10m
30-88	39	40
88-216	43.5	40
216-230	46.4	40
230-960	46.4	47
960-1000	49.5	47
>1000	49.5	No Limit

Class B Digital Devices

FCC Limits *			CISPR Limits *
Frequency (MHz)	Field Strength @3m	(dBuV/m) @10m	Field Strength (dBuV/m) @10m**
30-88	40	29.5	30
88-216	43.5	33	30
216-230	46	35.6	30
230-960	46	35.6	37
960-1000	54	43.5	37
>1000	54	43.5	No Limit

* The FCC Class B limits were converted to 10 meters using an inverse linear distance extrapolation faction (20 dB/decade), as specified in 47 CFR Section 15.31(f)(1). CISPR limits and FCC limits ≤ 1000 MHz are based on quasi-peak measurements. FCC limits above 1000 MHz are based on the use of an average detector. For emissions above 1000 MHz, 47 CFR Section 15.35 also limits the

emissions, measured with a peak detector, to 20 dB above the stated average limit, e.g., peak emissions above 1000 MHz for Class A devices, measured at a distance of 10 meters, shall not exceed 3000 uV/m (69.5 dBuV/m). Measurements above 1000 MHz are required under 47 CFR Section 15.33 when the digital device contains an oscillator operating at 108 MHz or higher.

** CISPR Publication 22 states that if the field strength measurement at 10 meters can not be made because of high ambient noise levels or for other reasons measurements may be made at a closer distance, for example 3 meters. An inverse proportionality factor of 20 dB per decade should be used to normalize the measured data to the specified distance for determining compliance. Care should be taken in measurement of large test units at 3 meters at frequencies near 30 MHz due to near field effects.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-41

In the Matter of

WAYNE C. MURPHY

Licensee of Station WDAT(AM)
Amory, Mississippi

Order to Show Cause Why the License
for Station WDAT(AM), Amory,
Mississippi, Should Not Be Revoked

Appearances

Wayne C. Murphy pro se;[1] and *James W. Shook* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: July 24, 1992; Released: August 3, 1992

Preliminary Statement

1. On March 26, 1992, the Commission ordered Wayne C. Murphy (Murphy) to show cause why the license for WDAT (AM), Amory, Mississippi should not be revoked. *See* FCC 92-92. They did so after investigating why WDAT(AM) has been off-the-air without authority since June 15, 1989.

2. The prehearing conference was held on June 24, 1992. Wayne Murphy failed to appear. *See* FCC 92M-721 released June 30, 1992. We held the scheduled evidentiary admission session on July 2, 1992. Wayne Murphy again failed to appear. *See* FCC 92M-757 released July 7, 1992. On July 8, 1992 the Mass Media Bureau filed a Motion for Summary Decision. They want Murphy's license revoked, and this proceeding terminated. Again Wayne Murphy failed to respond.[2]

Ruling

3. The Mass Media Bureau's unopposed Motion for Summary Decision will be granted. Since no genuine material issue of fact exists, the truth is clear. Murphy has violated designated issues 3(a) and 3(b). *See* FCC 92-92 *supra*. They will be resolved against him.

Findings of Fact

4. Wayne Murphy is now and has been the licensee of Station WDAT(AM), Amory, Mississippi. On February 4, he asked and received permission from the Commission to remain silent until June 15, 1989. That permission was granted so that Murphy could resolve his financial difficulties.

5. Murphy never put WDAT back on the air. On November 8, 1990 and again on August 20, 1991, the Chief, Audio Services Division sent Murphy a letter. The Chief called on Murphy to submit information concerning his (Murphy's) compliance or noncompliance with 47 CFR 73.1740 (Minimum Operating Schedule)[3] and 47 CFR 73.1750 (Discontinuance of Operation).[4] The Chief's November 8, 1990 and August 20, 1991 letters were sent to Murphy at his last known address-of-record. The U.S. Postal Service returned both letters as being undeliverable.

6. So, on March 26, 1992, the Commission released an Order to Show Cause and Hearing Designation Order. *See* FCC 92-92 *supra*. There they designated 47 CFR 73.1740 and 73.1750 issues against Murphy and directed him to show cause why the license for Station WDAT(AM) should not be revoked. The Commission further instructed Murphy to file his 47 CFR 1.91(c) notice of appearance on or before April 27, 1992.

7. Murphy did so. On April 27, 1992 attornies Catherine M. Withers and M. Scott Johnson of Gardner, Carton, and Douglas filed an appearance notice on Murphy's behalf. They represented that Murphy would appear and give evidence on the issues the Commission wanted heard.

8. The Mass Media Bureau was instructed to initiate any discovery (if it so desired) on or before May 8, 1992. The Bureau initiated timely discovery on May 7, 1992. They served a Request for Admissions on Murphy.

9. After obtaining an extension of time, Murphy responded to those admissions on May 28, 1992. In that response Murphy admitted that Station WDAT is silent and has been since February 4, 1989; that he (Murphy) only received Commission permission to remain silent until June 15, 1989; that he hasn't requested permission to remain silent after June 15, 1989; and that he is not financially able to return Station WDAT to operation at this time.

10. Although Murphy did not and has not submitted a request to suspend the hearing pursuant to the Commission's *Minority Distress Sales Policy*[5], in his May 28, 1992 response he asserted that he had ". . . entered into an agreement in principle with a minority person" for the sale of the station. Moreover, he and this unnamed minority person have not submitted an assignment application.

11. The following week, on June 3, 1992, Withers and Johnson withdrew as Murphy's Counsel. *See* FCC 92M-648 released June 8, 1992.[6] In so doing they indicated that any further communications and correspondence should be directed to:

Wayne C. Murphy
1220 E. Northside Drive, #230
Jackson, MS 39211

12. Their withdrawal caused the Trial Judge to alert Murphy about his obligations to appear here in Washington, D.C. at the prehearing Conference scheduled for June 24, 1992; the Evidentiary Admission Session scheduled for July 2, 1992; and the Hearing scheduled for July 27, 1992.

13. We convened the scheduled prehearing conference on June 24, 1992. Wayne Murphy failed to appear. Instead, and part way through the conference the Trial Judge was handed a Western Union telegram purportedly signed by "Wayne C. Murphy, licensee."

14. The telegram was sent from Reno, Nevada at 2:54 a.m. (PDT). It requested a continuance of the prehearing and stated "Inches from finalizing sale to local minority businessman. Expect transfer under minority distress sale policy . . ."

15. This too-little-too late ploy resulted in the Trial Judge declaring Murphy to be in a state of default. *See* FCC 92M-721, released June 30, 1992. The Trial Judge admonished Murphy to attend the July 2, 1992 evidentiary admission session, and pointed out to him that he was dangerously close to having WDAT(AM)'s license summarily revoked.

16. We held the scheduled evidentiary admission session on July 2, 1992. Again, Wayne Murphy failed to appear. This time he didn't even bother to send an untimely telegram. As a consequence of Murphy's double-default the Trial Judge invited the Bureau to file a Motion for Summary Decision in lieu of holding an *in abstentia* hearing on July 27, 1992. The Bureau accepted that invitation, and on July 8, 1992, filed the Motion for Summary Decision described in paras. 2-3 *supra*. As previously noted, Murphy once again has failed to respond.

Conclusions of Law

1. Station WDAT(AM), Amory, Mississippi has been off the air without authority since June 15, 1989. This extended unauthorized silence has apparently been due to financial difficulties its licensee, Wayne Murphy, has experienced and is experiencing. Thus, Murphy has been in continuous violation of 47 CFR 73.1740(a)(4) and 47 CFR 73.1750 for over three years.

2. During the three years of unauthorized silence the Commission has attempted to obtain information from Murphy about his compliance with 47 CFR 73.1740 and 73.1750. They sent Murphy letters on November 8, 1990 and again on August 20, 1991. Those letters were sent to Murphy at his last known address-of-record. The U.S. Postal Service returned them both as undeliverable.

3. After the Commission designated WDAT(AM) for hearing, they were able to temporarily establish limited and sporadic contact with Murphy (Findings 6-14 *supra*). However, even that occasional contact broke down, and the Trial Judge declared Murphy in default for failing to attend the June 24, 1992 prehearing conference. Murphy remained in a state of default by failing to attend the July 2, 1992 evidentiary admission session, and now he has failed to respond to the Mass Media Bureau's request for summary decision.

4. In sum, Station WDAT(AM) has been silent without Commission authorization since June 15, 1989, and no reasonable likelihood exists that the Station will return to the air within the foreseeable future. In such situations, Commission policy is to revoke the station's license. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 546 (1989).

SO the Motion for Summary Decision that the Mass Media Bureau filed on July 8, 1992, IS GRANTED; and

Unless an appeal is taken from this Summary Decision or the Commission reviews it on its own motion, Wayne C. Murphy's license for Station WDAT(AM), Amory, Mississippi, IS REVOKED;[7] and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] There was a period of time when Mr. Murphy was represented by Catherine M. Withers and M. Scott Johnson of Gardner, Carton, and Douglas. However Withers and Johnson withdrew their Notice of Appearance on June 8, 1992. *See* FCC 92M-648.

[2] Any Comments on or Oppositions to the Bureau's motion were due on or before July 22, 1992.

[3] *47 CFR 73.1740(a)(4) provides:* In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

[4] *47 CFR 73.1750 provides:* The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

[5] *Statement of Policy on Minority Ownership in Broadcasting Facilities*, 68 FCC 2d 979 (1978); *Clarification of Distress Sale Policy*, 44 RR 2d 479 (1978). Also see, *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849 (1982).

[6] It shouldn't pass unnoticed that Murphy's counsel needed an extension of time to respond to the Bureau's May 7, 1992 Request for Admissions. *See* FCC 92M-589 released May 21, 1992.

[7] If exceptions aren't filed within 30 days, and the Commission doesn't review the case on its own motion, this Summary Decision will become effective 50 days after its public release.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

USA MOBILE COMMUNICATIONS INC. II — File No. 21909-CD-P/ML-01-90

For facilities in the
Public Land Mobile Service
at Indianapolis, Indiana
for station KKB731

PAGING USA, INC. — File No. 23814-CD-P/ML-01-90

For facilities in the
Public Land Mobile Service
at Indianapolis, Indiana
for station KWT731

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 1992; **Released: July 31, 1992**

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. USA Mobile Communications, Inc. II (USA Mobile) and Paging USA, Inc. (Paging USA) filed mutually exclusive applications for paging facilities in the Public Land Mobile Service (PLMS) on frequency 454.650 MHz at Indianapolis, Indiana. A lottery was held, and USA Mobile won. The Mobile Services Division (MSD) then granted[1] the USA Mobile application and dismissed the Paging USA application.[2] Upon review, it appeared that Paging USA had timely filed a petition to deny against the USA Mobile application, which the staff had not addressed. The USA Mobile application was accordingly returned to pending status. Paging USA has filed a petition for reconsideration of the dismissal of its application. For the reasons set forth below, we deny the petition for reconsideration, dismiss the petition to deny, and grant the USA Mobile application.

II. DISCUSSION

2. Paging USA contends in its petition for reconsideration that its application should be reinstated because the MSD did not address its petition to deny. Because this order now addresses the merits of the petition to deny, Paging USA's petition for reconsideration is denied as moot. Paging USA does not raise any new issues or arguments of decisional import in rendering an opinion on the petition to deny. *See e.g, Pacifica Foundation v. National Education Foundation, Inc.*, 17 Rad. Reg. 2d (P&F) 1073 (1969).

3. Paging USA argues in its petition to deny that the USA Mobile application is defective because it lacked a loading study,[3] would cause interference, and was filed as a strike application. In response, USA Mobile submitted an amendment (loading study amendment) on April 9, 1990, and denied the allegations of interference and strike motive.[4] We reject all of Paging USA's arguments. Section 309(d) of the Communications Act of 1934 requires a two-tiered analysis of petitions to deny, the second tier of which involves a strict scrutiny of the pleadings in order to determine whether a hearing is necessary. *See Astroline Communications Company Limited Partnership*, 857 F.2d 1556, 1562-63 (D.C. Cir. 1988). Under Section 309(d)(1) of the Act, Paging USA has not met the threshold test of raising "specific allegations of fact sufficient to show that...a grant of the application would be prima facie inconsistent with" the public interest. That being so, Paging USA's petition also failed to raise any "substantial and material questions of fact," as required under Section 309(d)(2) of the Act, such that a hearing would be required.

4. Paging USA objected to the USA Mobile loading study amendment because it was not signed by a company officer as required by Sections 1.743(a)[5] and 22.23(f)[6] of the rules, and *American Cellular Network Corp. of Nevada*, 2 FCC Rcd 4530 (1987), (*American Cellular*). USA Mobile subsequently filed another loading study amendment on February 28, 1991, which bore the signature of a company officer (signature amendment), as required under Section 1.743 of the rules.[7] Paging USA also challenges the signature amendment, arguing that it violated Section 22.23(a) of the rules, and was untimely filed after the 60-day cutoff date set forth in Section 22.31 of the rules. We disagree. Section 1.743 of the rules prohibits amendment of defectively signed applications, but we have long held that defectively signed amendments may be cured by subsequent amendment. *Florida Cellcom*, 2 FCC Rcd 7044 (Com. Car. Bur. 1987); *American Cellular, supra; Douglas R. Casey*, 65 Rad. Reg. 2d (P&F) 1340, 1341 (1988). Furthermore, USA Mobile filed a petition showing good cause for filing the signature amendment as a curative minor amendment under Section 22.23(b) of the rules. Finally, it is well-established Commission policy to accept post-cutoff curative minor amendments if the application has not been returned as defective. *Moore's Service*, 86 FCC 2d at 795-96.[8] Accordingly, we accept the USA Mobile curative signature amendment and reject Paging USA's allegations.

5. Paging USA also contends that USA Mobile had insincerely filed the instant application as "an attempt to restrict [Paging USA's] legitimate expansion capabilities." Petition to Deny at 4. Paging USA argues that *Pass Word, Inc*, 61 FCC 2d 410 (1976), requires dismissal in this instance. We disagree. Paging USA has failed to present even a *prima facie* showing, under Section 309 of the Act, that USA Mobile had a strike motive in filing the instant application. In Pass Word the alleged strike application was filed subsequent to the petitioner's filing of its application, and certain telephone conversations were also in issue which raised "subtantial and material questions of fact" regarding whether the application had been filed with an anticompetitive purpose. 61 FCC 2d at 417-18; Section 309(d)(2) of the Communications Act of 1934. In contrast, USA Mobile had filed the captioned application prior to Paging USA having filed its petition or application. Furthermore, the petition itself simply makes a bald and unsupported assertion that the captioned application is

a strike application. We have no grounds therefore to conclude otherwise and we reject Paging USA's strike allegations.

6. Lastly, Paging USA argues that USA Mobile's initial interference study was inadequate and that related amendments subsequently filed at the request of the Mobile Services Division (MSD) were untimely, unresponsive and failed to demonstrate interference-free operation. We reject these contentions. In the first instance, the MSD had determined that USA Mobile's interference study accompanying the captioned application did demonstrate interference-free operation, but only along co-channel radials. Accordingly, USA Mobile filed additional information in an amendment in response to an MSD request by letter dated June 17, 1991.[9] The MSD subsequently required further information by letter dated April 16, 1992, to which USA Mobile has timely and satisfactorily responded.[10] Section 22.28(c) of the rules[11] requires applicants to respond to MSD requests for additional information. In fully responding to the letter requests, the USA Mobile amendments alleviated any remaining interference concerns, and are therefore authorized under the rules.

III. CONCLUSION

7. For the reasons discussed above, we conclude that USA Mobile is legally, technically, and otherwise qualified to construct and operate the proposed facilities, and we further find that a grant of its application will be in the public interest and will promote the efficient provision of service to the public.

IV. ORDERING CLAUSES

8. IT IS ORDERED that the Petition for Reconsideration of the dismissal of the application of Paging USA, Inc., IS DENIED.

9. IT IS FURTHER ORDERED that the Petition to Deny filed by Paging USA, Inc., IS DISMISSED.

10. IT IS FURTHER ORDERED that the application of USA Mobile Communications Inc. II, File No. 21909-CD-P/ML-01-90 IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

FOOTNOTES

[1] *Public Notice*, Rep. No. PMS-41-4 (Mar. 13, 1991).

[2] *Public Notice*, Rep. No. PMS-91-26-A (Mar. 27, 1991).

[3] Section 22.516(a)(2) of the rules requires loading studies for applications that request additional channels for an existing frequency. The purpose of the loading study requirement is to ensure that an applicant truly needs the frequency applied for and is not merely attempting to warehouse an extra channel. *Regulatory Policies and Procedures for Domestic Public Land Mobile Radio Service*, 53 Rad. Reg. 2d (P&F) 191, 193 (1983); 47 C.F.R. Section 22.516(a)(2).

[4] USA Mobile also argues in its opposition that the Paging USA application should not have been allowed into the lottery because it was filed after the 60-day cutoff period which began when the USA Mobile application went on public notice on January 31, 1990. USA Mobile argues that there is no date-stamped copy of Paging USA's application on file, and the microfiche copy of the application is dated April 4, 1990, three days after the cutoff date. Paging USA responds that the engineering affidavit to its application clearly shows that it was timely filed on March 30, 1990. While Paging USA has not produced a date-stamped copy, the engineering affidavit and the public notice listing the application as acceptable for filing suffice to show that it was timely.

[5] If the applicant is a corporation, the application and amendments must be signed by a company officer or a dully authorized employee of the corporation. 47 C.F.R. Section 1.743(a).

[6] Section 22.23(f) provides that:

> Any amendment to an application shall be signed and shall be submitted in the same manner, and with the same number of copies, as was the original application . . . .

[7] Paging USA argues that all curative amendments must be filed within 60 days of the date that the first mutually exclusive application goes on public notice, under Section 22.31 of the rules, citing *Rocky Top Enterprises, Inc.*, 48 Rad. Reg. 2d (P&F) 1585 (Mobile Serv. Div. 1981); *Allen C. Moore d/b/a Moore's Service*, 86 FCC 2d 787 (Com.Car.Bur. 1981) (*Moore's Service); David R. Williams d/b/a Industrial Communications*, 53 Rad. Reg. 2d (P&F) 38 (1983) (*Industrial*).

[8] The Bureau held in *Moore's Service* that: "where the Commission has not returned a defective mutually exclusive application and the applicant submits a post cutoff amendment that cures the defect . . . [the] amendment should be included in our evaluation of the pending application . . . ." 86 FCC 2d at 795.

[9] Letter From G.J. Vogt, Chief, Mobile Services Division to J. Urff, counsel for USA Mobile (June 17, 1991).

[10] *See* Letter from J.H. Bennett, Mobile Services Division, to L.H. Phillips, Dow, Lohnes & Albertson (Apr. 16, 1992).

[11] Section 22.289(c) of the rules provides:

> The Commission will dismiss an application . . . for failure to respond substantially within a specified period of time . . . to requests for additional information . . . .

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION SERVICES, INC.,
Complainant,

v.

THE BELL ATLANTIC TELEPHONE COMPANIES, and — File No. E-91-112
CINCINNATI BELL TELEPHONE COMPANY, — File No. E-92-021
Defendants.

ORDER

Adopted: July 23, 1992; Released: August 3, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Allnet Communication Services, Inc. (Allnet), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that Allnet presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. CONTENTIONS OF THE PARTIES

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Allnet's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied upon, as does Allnet in the instant complaints, rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules for the relevant monitoring period. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] The defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Defendants maintain that they must be allowed to offset overearnings against underearnings. Defendants contend that an award of damages based on the measure advocated by the complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*. CBT argues that even assuming that violations of the Act and actual damages in consequence thereof can be established, it would be inequitable to award damages to Allnet because Allnet would not flow through such damages to its own customers.[10]

6. Allnet has propounded interrogatories to each defendant. Both defendants, CBT and The Bell Atlantic Telephone Companies (Bell Atlantic), opposed the interrogatory requests, which are currently the subject of motions to compel and related pleadings.

IV. DISCUSSION

A. Measure of Damages

7. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Allnet may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Allnet, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainant in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that Allnet's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Allnet's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute Allnet's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

8. We will require defendants to make available to complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 7 herein.

B. Motions to Compel

9. CBT objects generally to any discovery regarding damages because there has been no finding of liability. CBT's argument that discovery regarding damages is premature is unavailing since we have decided not to adopt a bifurcated approach in these proceedings. Rather, as stated above, we have concluded that the parties' and the Commission's interests in obtaining the earliest practicable resolution of this matter will be better served by requiring the parties to develop a full record on the issues of liability and damages at this time.

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[7] Allnet also seeks interest on this amount. We note that Cincinnati Bell Telephone (CBT) argues that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by defendants in response to Allnet's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] CBT Motion to Dismiss at 8. We do not reach that issue in this interlocutory ruling. We are concerned here only with establishing a schedule for further discovery and briefing.

Interrogatories 1, 2, and 11

10. Allnet seeks to discover information about settlements of overearnings disputes between the defendants and other interstate customers. Bell Atlantic argues that this information is irrelevant, not likely to lead to the discovery of admissible evidence, and disclosure would violate public policy favoring settlements. CBT echoes Bell Atlantic's public policy argument, but states that it has entered into no settlement agreements. Allnet responds that the information is relevant to show the scope of discrimination which results from settlements and the extent to which carriers deviate from their tariffs when they settle.

11. We will not require defendants to answer these interrogatories. Allnet has not shown that the requested information regarding settlements is relevant or reasonably calculated to lead to the discovery of admissible evidence.

Interrogatories 5 and 6

12. Allnet seeks to discover when the defendants knew that their projected earnings for one or more interstate access service categories and for total interstate access service could be in excess of 12.4% and 12.25%, respectively. Defendants respond that they knew their rates of return with certainty when they filed their Forms 492. Allnet states that the defendants' answers are inadequate responses and argues that defendants should be required to give exact dates. Defendants reply that they have given the most exact answers as possible.

13. We will not require defendants to provide further answers to these interrogatories. We credit defendants' claims that they have answered as exactly as possible. To the extent that Allnet has information that would show that defendants knew or should have known at an earlier date that their earnings would exceed prescribed levels, it will have the opportunity to present such evidence when it submits its briefs.

Interrogatory 7

14. Allnet asks that defendants identify "the maximum allowed profit levels that [each defendant] was allowed to make" in each interstate service category and on total interstate access services during the relevant monitoring period. The defendants respond that this interrogatory is improper because it calls for a legal conclusion. Bell Atlantic further responds that the information sought is irrelevant and not likely to lead to the discovery of admissible evidence. Allnet seeks to compel only Bell Atlantic's response to this interrogatory. Allnet argues that the interrogatory is relevant because it "seeks to understand Bell Atlantic's position on the law in this proceeding."[11]

15. We will not require Bell Atlantic to answer this interrogatory. The interrogatory improperly calls for legal conclusions by defendant. Moreover, Allnet has not shown that the requested information is relevant or is reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory 8

16. Allnet seeks to discover the defendants' internal calculations of total damages for which they may be liable to interstate customers for the 1987-1988 period. The defendants respond in unison that the information sought is irrelevant, not likely to lead to the discovery of admissible evidence, and is subject to the attorney-client and attorney work product privileges. Allnet responds that the information is financial in nature, is entered on the defendants' books, and is therefore not subject to the attorney-client or work product privileges. Allnet further responds that the information sought is relevant because the instant complaints allege overearnings.

17. We will not require defendants to answer this interrogatory. Allnet has not shown that the information sought is relevant or is likely to lead to the discovery of admissible evidence. The total amount for which the defendants may be liable to all interstate customers is not relevant to any determination of the nature and extent of the defendants' liability to Allnet for damages.

Interrogatories 9 and 10

18. Allnet seeks to discover the "return actually earned" by each defendant for "total interstate and each interstate service category," and whether such amount is different from that reported on the defendants' Forms 492. Defendants object on the grounds of scope, vagueness and relevance, claiming that "total interstate" could include nonregulated activities. The defendants refer Allnet to their respective Forms 492. Bell Atlantic explains that its Form 492 provides the requested information if "total interstate" means total interstate access service. Further, Bell Atlantic states that certain changes to the information reported in its Form 492 are reported in its ARMIS 43-01 reports, and offers to provide copies of such reports if Allnet is unable to obtain copies. Allnet does not seek to compel CBT to respond. With regard to Bell Atlantic, however, Allnet responds that it will accept the narrow reading of "total interstate," but requests that Bell Atlantic provide it an updated Form 492 rather than the ARMIS 43-01 reports.

19. Allnet's request for additional information appears reasonable and does not impose an undue burden on defendant. We direct Bell Atlantic to provide to Allnet copies of those portions of its ARMIS 43-01 reports responsive to Allnet's interrogatories 9 and 10. In the alternative, Bell Atlantic may provide Allnet with a revised Form 492. However, we will not require Bell Atlantic to create a new Form 492.

Interrogatory 12

20. Allnet seeks to discover the names of the defendants' employees who provided information used in the responses to each of its interrogatories. Defendants responded by giving the name of the person under whose direction the responses were prepared. Allnet seeks to compel the defendants to list the names of every person who is the primary source of the responses to the interrogatories to ensure the accuracy and thoroughness of the responses.

21. We will not require defendants to further answer this interrogatory. We find defendants' statements that the persons named have knowledge or control of the information provided fully responsive.

[11] Allnet's Motion to Compel Response to Complainant's First Set of Interrogatories at 7.

V. CONCLUSION

22. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will afford the complainant and the defendants the opportunity to engage in further discovery in these proceedings pursuant to the timetable set forth herein. Additionally, we will establish a timeframe for the filing of briefs and reply briefs by complainant and defendants.[12]

VI. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. §0.291, that complainant's Motions to Compel Responses to Interrogatories filed on April 13, 1992, April 20, 1992, and June 19, 1992 ARE GRANTED to the extent indicated herein and are otherwise DENIED. Defendants shall provide the information to complainant within 30 days of the release date of this Order.

24. IT IS FURTHER ORDERED THAT within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 8 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to complainant within the thirty-day period.

25. IT IS FURTHER ORDERED that the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 7 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

26. IT IS FURTHER ORDERED that the complainant and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[12] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION SERVICES, INC.,
Complainant,

v.

ILLINOIS BELL TELEPHONE COMPANY,	File No. E-91-030
INDIANA BELL TELEPHONE COMPANY, INCORPORATED,	File No. E-91-031
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-91-032
THE OHIO BELL TELEPHONE COMPANY, and	File No. E-91-033
WISCONSIN BELL, INC.,	File No. E-91-034

Defendants.

ORDER

Adopted: July 22, 1992; Released: July 31, 1992

By the Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Allnet Communication Services, Inc. (Allnet), may be entitled to recover damages as a result of defendants' (collectively "Ameritech") alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. Allnet filed the above-captioned complaints against Ameritech alleging that Ameritech overearned for the period January 1, 1987 through December 31, 1988, and that Ameritech has included unauthorized lobbying, litigation, and affiliate transaction costs in the expenses and investments that Ameritech reported for the 1987-1988 monitoring period. Allnet alleges that inclusion of these costs has depressed Ameritech's reported rate of return.[1]

II. BACKGROUND

2. The case that Allnet presents against the defendant local exchange carriers (LECs) is similar, in large part, to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases largely parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

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[1] Additionally, Allnet alleges that Ameritech has failed to provide Allnet with dial-1 access. Allnet states that Ameritech assessed full premium access charges on Allnet even though it had not provided Allnet with equal access and that this contributed to Ameritech's overearnings. Allnet requests damages in the amount of the difference between the premium charges assessed and the non-premium charges that should have been assessed during the 1987-1988 monitoring period.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[4] The complainants relied upon, as does Allnet in the instant complaints, rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules for the relevant monitoring period. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[6] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be

III. CONTENTIONS OF THE PARTIES

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Allnet's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8] Allnet and Ameritech have propounded interrogatories which are the subject of two motions to compel filed by Allnet and one motion to compel filed by Ameritech.[9]

5. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. The defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[10] and, therefore, unlawful. Defendants further contend that the fact that their rates produced overearnings in one access category is not sufficient to establish damage to complainant when the Ameritech Operating Companies' overall interstate rate of return was below the authorized level.

6. The defendants filed general objections[11] to Allnet's first set of interrogatories, responded to several interrogatories, and did not respond to several interrogatories. Allnet propounded a second set of interrogatories, which Ameritech did not answer. Finally, Ameritech propounded interrogatories to Allnet to which Allnet did not respond or object. Allnet and Ameritech have filed motions to compel responses to their interrogatories.

IV. DISCUSSION

A. Measure of Damages

7. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Allnet may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Allnet, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that Allnet's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Allnet's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute Allnet's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

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viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[8] Allnet also seeks interest on this amount. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] Allnet filed its Second Motion to Compel Response to First Set of Interrogatories on June 24, 1991. On September 3, 1991, Allnet filed a Motion to Compel a response to its second set of interrogatories. Ameritech filed its Motion to Compel Allnet's Response to First Set of Interrogatories on July 16, 1991. The parties have filed oppositions and replies to each of the motions to compel.

[10] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[11] Ameritech objects that the interrogatories have not been limited to the relevant timeframe. Ameritech points out that Allnet, in its interrogatory instructions, calls for information beginning January 1, 1987 and up to the date of its interrogatories (April 1, 1991). Ameritech argues there is no relevance to information subsequent to the 1987-1988 monitoring period. Allnet responds that the general instructions apply unless some other time period has been specified and that some actions relating to the 1987-1988 monitoring period took place after the end of that period (for example, the filing of Ameritech's Forms 492). Ameritech has also raised general concerns regarding privileged and confidential information from affiliates. These concerns will be addressed in the context of individual interrogatories as necessary.

8. We will require defendants to make available to complainant information necessary to compute the difference between the amount the complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 7 herein.

B. Motions to Compel

1. Allnet's First Set of Interrogatories

9. Allnet filed its first set of interrogatories on April 1, 1991. Ameritech filed an opposition and answer to the interrogatories on June 7, 1991. Allnet then filed a motion to compel.[12]

Interrogatory No. 2

10. Interrogatory No. 2 requests information describing products and services of Ameritech's affiliates, where the cost of those products or services were subsequently passed on to Ameritech. Ameritech answered this interrogatory. Allnet, however, seeks to compel Ameritech to provide "standard" names for the products identified by Ameritech so that Allnet can see if Ameritech paid "standard" prices for "standard" products. Ameritech contends that it has sufficiently answered this interrogatory. In addition, Ameritech argues that Allnet did not request "standard" names in its original interrogatory. Finally, while Ameritech states that "a 'standard' price" for these products does not exist in most instances, it does admit that standard names and prices do exist for tariffed and prevailing price services and products.

11. Allnet's request for additional information appears reasonable and does not impose an undue burden on defendants. We will only require Ameritech to provide standard names for tariffed and prevailing price products for the 1987-1988 monitoring period. Transactions outside the 1987-1988 timeframe are not relevant to these complaint proceedings.

Interrogatory No. 3

12. Interrogatory No. 3 requests that Ameritech identify all public utility commission investigations that raise or have raised issues relating to affiliate transactions. Ameritech generally objects on the grounds that this asks for information outside the relevant timeframe of the complaint. In addition, Ameritech objects that the information sought is irrelevant.

13. We will not require Ameritech to answer this interrogatory. Allnet has failed to show how the existence or nature of state public utility commission investigations at the intrastate level are relevant to these interstate proceedings.

Interrogatory Nos. 4 and 5

14. Interrogatory Nos. 4 and 5 request the rate of return on investment and on equity, respectively, for Ameritech's affiliates for the 1987-1988 period. Ameritech objects on the grounds that the rate of return on investment for non-regulated affiliates is irrelevant, and privileged and confidential. In addition, Ameritech claims that disclosure of such confidential information would cause it competitive harm. Finally, Ameritech states that it does not have such information and cannot be compelled to produce information it does not have.

15. We will require Ameritech to respond to Interrogatory No. 4 concerning the rate of return on investment of Ameritech's affiliates. However, this information need only be provided with respect to regulated affiliates and non-regulated affiliates that did substantially all of their business with Ameritech during the 1987-1988 period. To the extent that the interrogatory seeks information that the defendants maintain is confidential in nature, we urge the parties to work together to achieve a confidentiality agreement that will facilitate the prompt exchange of any information properly subject to protection.[13]

16. We sustain the defendants' objection to Interrogatory No. 5 because Allnet has not shown that the information sought regarding affiliates' rate of return on equity is relevant or is reasonably calculated to lead to the discovery of admissible evidence in these complaint proceedings.

Interrogatory No. 6

17. Interrogatory No. 6 requests that, for each of its affiliates, Ameritech state how much in charges were subsequently passed on to Ameritech directly or through those affiliates for the 1987-1988 period. Ameritech objects on the grounds that the interrogatory is vague. In addition, Ameritech argues that the total amount of charges paid by Ameritech for goods and services provided by non-regulated affiliates is irrelevant. Allnet argues that, when correlated with the level of profits for each year, the amount of revenues from the operating companies provides evidence of the shifting of profits from regulated to non-regulated companies.

18. We will not require Ameritech to provide the requested information. Allnet has not shown that this information is relevant or is reasonably calculated to lead to the discovery of admissible evidence.

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[12] Ameritech filed an opposition to Allnet's motion to compel on July 9, 1991; Allnet filed a reply on July 19, 1991.

In addition, Allnet filed a Motion to Compel Response to First Set of Interrogatories on May 15, 1991. The Enforcement Division, Common Carrier Bureau, released an order on February 20, 1991, stating that a status conference would be held to establish a schedule for further proceedings as necessary for these formal complaints. *Order*, 6 FCC Rcd 980 (Com.Car.Bur. 1991). At the time Allnet filed this motion to compel such schedule had not been established. Allnet's motion, therefore, is unauthorized and will be dismissed accordingly.

[13] With respect to any information that is or could be filed with the Commission, the parties should be guided by Section 0.441 *et seq.* of the Commission's rules, 47 C.F.R. § 0.441 *et seq.*, in negotiating protective or confidentiality agreements.

Interrogatory No. 7

19. Interrogatory No. 7 requests information regarding what portions of amounts identified in response to Interrogatory No. 6 were set by formal competitive open bid. Ameritech objects on the grounds that the information is irrelevant, bids are not required under Part 64 of the Commission's rules and that it cannot be compelled to manufacture an exhibit for the complainant.

20. Ameritech need not answer this interrogatory since we have denied Allnet's motion to compel with respect to Interrogatory No. 6.

Interrogatory Nos. 9 and 10

21. Interrogatory Nos. 9 and 10 request information regarding the total amount of lobbying expenditures and Modification of Final Judgement (MFJ) litigation expenditures, respectively, passed on to Ameritech by affiliates for the 1987-1988 period. Ameritech objects to the definition of lobbying as provided by Allnet as it does not comport with the definition of lobbying contained in the Commission's rules. In addition, Ameritech states that its non-regulated affiliates are not obligated to keep their records under Part 32 of the Commission's rules. With regard to Interrogatory No. 10, Ameritech states that it is not required to maintain an MFJ litigation subaccount that captures this expense. Ameritech argues that it cannot be required to create an exhibit for complainant.

22. We will require Ameritech to answer Interrogatory No. 9 insofar as it pertains to regulated affiliates of Ameritech for the 1987-1988 period only. However, we will require that Ameritech answer only with regard to "lobbying" expenditures as that term is defined in Section 32.7370 of the Commission's rules.[14] We credit Ameritech's statement that it does not maintain MFJ litigation subaccounts. Accordingly we will not require Ameritech to create such accounts to provide the information to complainant in response to Interrogatory No. 10.

Interrogatory No. 11

23. Interrogatory No. 11 requests that Ameritech

> [p]rovide the total dollar amount of expenditures charged to the AMERITECH [sic] pursuant to the procedures referred to in interrogatory No. 8 above, by account, that were subsequently passed on to AMERITECH directly or through affiliates for the period 1987-1988.[15]

Allnet states that this interrogatory "gives a breakdown by account of the amount of [sic] contained in each account that is charged to the ratepayers."[16] Ameritech contends that this interrogatory is vague, ambiguous and irrelevant. In addition, Ameritech argues that a total dollar amount is not relevant as to whether expenses in the accounts were not properly allocated.

24. We will not require Ameritech to answer this interrogatory. We find that both the interrogatory and the reason provided in support thereof are overly vague. In addition, Allnet has failed to show that the requested information is relevant or is reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 12

25. Interrogatory No. 12 requests information regarding all settlements of Ameritech with interstate customers that settled any claims for overearnings during the 1987-1988 period. Ameritech objected on the grounds that such information is irrelevant and confidential.

26. We will not require Ameritech to answer this interrogatory. Allnet has not shown that the requested information regarding settlements by Ameritech is relevant or is reasonably calculated to lead to the discovery of admissible evidence.[17]

Interrogatory No. 13

27. Interrogatory No. 13 requests that Ameritech identify any contacts between it and the Commission regarding the captioned-complaints or matters addressed in the complaints. Ameritech objects that this interrogatory is overly broad and irrelevant.

28. We will not require Ameritech to answer this interrogatory as it is not relevant to any allegations made by Allnet in its complaints.

Interrogatory No. 14

29. Interrogatory No. 14 requests that Ameritech identify all correspondence between it and its major switch manufacturers relating to "existing or future intraLATA dial-1 equal access capability in the switches of those manufacturers."[18] Ameritech objects on the grounds that the information is irrelevant. It states that it has admitted that it doesn't provide intraLATA dial-1 access to Allnet, and further states that it has not represented that it was incapable of providing such service because of switches.

30. We will not require Ameritech to answer Interrogatory No. 14. Allnet has not shown how the information sought is relevant, especially in light of the fact that Ameritech has admitted it does not provide the dial-1 service and has denied that switch capabilities are the reason it does not provide such service.

Interrogatory No. 15

31. Interrogatory No. 15 requests a description of how Ameritech's costs related to staff support for MFJ litigation and lobbying efforts are booked into Ameritech's accounts. Ameritech objects on the grounds that this interrogatory is vague, ambiguous, repetitious, and irrelevant.

32. We will not require Ameritech to answer this interrogatory because Allnet has not shown that the information sought is relevant or is reasonably calculated to lead to the discovery of admissible evidence.

2. Allnet's Second Set of Interrogatories

33. Allnet filed its second set of interrogatories on July 19, 1991. By letter dated August 19, 1991, Ameritech responded that it would not answer the interrogatories

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[14] 47 C.F.R. § 32.7370.

[15] Complainant's First Set of Interrogatories at 7.

[16] Complainant's Second Motion to Compel Response to First Set of Interrogatories at 14.

[17] Because we do not find the requested information to be relevant, we do not reach Ameritech's claims that the requested information regarding settlements is confidential.

[18] Complainant's First Set of Interrogatories at 8.

because Allnet had not sought permission from the Commission to propound the additional interrogatories. Allnet contends that the information sought by these interrogatories is necessary in order to confirm answers to its first set of interrogatories or limit the scope of some of its claims. On September 3, 1991, Allnet filed a motion to compel a response, which Ameritech opposed. Allnet filed a reply to the opposition.

34. We will not require Ameritech to answer these interrogatories. By its own admission, Allnet concedes that some of the interrogatories are repetitious as they seek merely to limit the scope of previously propounded interrogatories.[19] In addition, a number of the interrogatories seek information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence.[20] Accordingly, Allnet's motion to compel responses to its second set of interrogatories will be denied.

3. Ameritech's Interrogatories[21]

35. Ameritech propounded four interrogatories requesting that Allnet identify any and all documents relied upon by Allnet to support certain of the allegations contained in its complaint. These allegations are that Ameritech included (1) MFJ and cable TV legislation lobbying-related costs, (2) MFJ-related litigation costs, and (3) certain costs for affiliate transactions in the expenses and investments used for computing the rate of return reported in Ameritech's Form 492 (Interrogatories 1, 2, and 3). In addition, Ameritech asks that Allnet describe each affiliate transaction referenced in paragraph 13 of Allnet's complaint (Interrogatory 4).

36. In its motion to compel, Ameritech argues that the information requested in the interrogatories is relevant because Ameritech seeks to discover the basis of allegations in Allnet's complaint.[22] Allnet contends that Ameritech's motion to compel should not be granted because Ameritech has not carried its burden of stating the relevance of and necessity for the information.

37. We will grant Ameritech's motion to compel. The documents and transactions that Ameritech seeks to have identified appear to be directly related to matters placed in issue by Allnet in these proceedings. Allnet has not claimed that identification of these documents and transactions would be burdensome or otherwise prejudicial.

V. CONCLUSION

38. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will afford complainant and defendants the opportunity to engage in further discovery in these proceedings pursuant to the timetable set forth herein. Additionally, we will establish a timeframe for the filing of briefs and reply briefs by complainant and defendants.[23]

VI. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED that, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, Complainant's Motion to Compel Response to First Set of Interrogatories, filed on May 15, 1991, IS DISMISSED.

40. IT IS FURTHER ORDERED that Complainant's Second Motion to Compel Response to First Set of Interrogatories, filed on June 24, 1991, IS GRANTED to the extent indicated herein and is otherwise DENIED. Defendants shall provide the information to complainant within 30 days of the release date of this Order.

41. IT IS FURTHER ORDERED that Ameritech's Motion to Compel Allnet's Response to First Set of Interrogatories, filed on July 16, 1991, IS GRANTED to the extent indicated herein and is otherwise DENIED. Complainant shall provide the information to defendants within 30 days of the release date of this Order.

42. IT IS FURTHER ORDERED that Complainant's Motion to Compel, filed on September 3, 1991, IS DENIED.

43. IT IS FURTHER ORDERED that within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 8 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

44. IT IS FURTHER ORDERED that the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 7 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

45. IT IS FURTHER ORDERED that the complainant and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

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[19] *See* Complainant's Motion to Compel at p. 2 (filed September 3, 1991).

[20] For example, Allnet seeks information regarding the names of interstate customers with whom Ameritech has settled. We have denied an Allnet request for information regarding settlements. *See* paras. 25 and 26 *supra*.

[21] Ameritech filed its interrogatories on May 30, 1991. Allnet did not answer or object to the interrogatories. On July 16, 1991, Ameritech filed a motion to compel Allnet's response, which Allnet opposed. Ameritech filed a reply.

[22] In addition, Ameritech requests that Allnet be ordered to pay reasonable attorney's fees for the preparation of its motion to compel. Ameritech argues that Ameritech had to file the motion to compel because Allnet willfully disregarded its obligations under the Commission's rules to make any objection or response to its interrogatories. We will not reach this request in this interlocutory order.

[23] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, and — File No. E-90-358
NEW YORK TELEPHONE COMPANY, — File No. E-90-359
Defendants.

ORDER

Adopted: July 23, 1992; Released: July 31, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Telesphere Network, Inc. (Telesphere), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription and affiliate transaction rules for the period January 1, 1987 through December 31, 1988. In addition to alleging that defendants overearned for the period January 1, 1987 through December 31, 1988, Telesphere also alleges that the defendants improperly allocated the costs of unlawful affiliate transactions in their interstate revenue requirement.[1]

II. BACKGROUND

2. The case that Telesphere presents against the defendant local exchange carriers (LECs) is similar, in large part, to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Telesphere's allegation that the defendants' included in their regulated rates expenses from purchases of goods and services from their affiliates at inflated prices is primarily based on a Commission order to show cause and notice of apparent liability for forfeitures (NAL).[6] The Commission initiated the proceeding against the defendants based on allegations that an affiliated company, NYNEX Materiel Enterprises Company (MECO), had unreasonably marked up and overcharged sales of equipment and services to the defendants, who in turn, recorded those inflated costs in their interstate revenue requirement. In its *Order to Show Cause and NAL*, the Commission determined that the defendants' actions were apparently inconsistent with the Commission's affiliate transaction rules and policies and directed the defendants to show cause why they should not be assessed forfeitures. Subsequently, the Commission adopted a consent decree that concluded the enforcement proceeding and in which the defendants did not admit any wrongdoing or violations.[7]

4. Because the operative facts and questions of law involved in the instant cases largely parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We be-

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[1] On June 18, 1992, Swidler & Berlin, Chartered, counsel of record for Telesphere, filed a motion to stay these proceedings. The motion to stay has been dismissed. *See* Order, DA 92-938 (released July 20, 1992).

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[4] The complainants relied, as does Telesphere in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[6] In the Matter of New York Telephone Co. and New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, *Order to Show Cause and Notice of Apparent Liability For Forfeitures*, 5 FCC Rcd 866 (1990) (*Order to Show Cause and NAL*).

[7] In the Matter of New York Telephone Co. and New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, *Order*, 5 FCC Rcd 5892 (1990) (*Consent Decree Order*), *recon. denied*, 6 FCC Rcd 3301 (1991).

lieve that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[8]

III. CONTENTIONS OF THE PARTIES

5. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Telesphere's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[9]

6. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. The defendants argue that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[10] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rates of return were below the authorized level. Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. The defendants contend that there is no significant difference between an award of damages based on the measure advocated by the complainant and the automatic refund rule found unlawful in *AT&T v. FCC*. In addition, defendants argue that even if costs of unlawful affiliate transactions were included in their regulated rates, the Commission has previously prescribed an exclusive remedy for any overcharges resulting from such actions.[11]

7. Telesphere has propounded interrogatories to each defendant seeking information concerning the issues raised in its complaints. The defendants have opposed some of the interrogatory requests, which are currently the subject of a motion to compel and related pleadings.

IV. DISCUSSION

A. Measure of Damages

8. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Telesphere may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Telesphere, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels or unlawful affiliate transactions. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that Telesphere's share of the excessive

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[8] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[9] Telesphere also seeks interest on this amount as well as attorney's fees. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[10] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,034 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[11] NET and NYT Motion to Dismiss at 11, *citing Order to Show Cause and NAL* at para. 32, where the Commission proposed to direct the defendants to make a one-time reduction of interstate revenue requirements in their 1990 Annual Access Tariff Filing. This adjustment to the defendants' rates represented apparent overcharges imposed on ratepayers in previous years due to the artificially inflated rate bases and unreasonable expense charges resultant from the NYNEX purchasing arrangement with MECO.

earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Telesphere's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute Telesphere's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

9. We will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return for that period. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 7 herein for the relevant monitoring period.

B. Motion to Compel

10. Telesphere filed a motion to compel defendants' responses to Interrogatories 6, 7, 8, 9, 10, 11, 12, 20, 21, 22, 23, 24, 28, and 29. The defendants filed an opposition.

Interrogatories 6, 7, 8, 9

11. Telesphere's Interrogatories 6 through 9 request information concerning the defendants' contentions that their rates are just and reasonable.[12] Telesphere states that these interrogatories seek to determine whether the defendants' positions are based upon contentions that their rates were not intentionally developed to violate the Commission's prescriptions. Telesphere argues that the information sought by these interrogatories is clearly relevant to the issues raised in its complaints.

12. The defendants object to Interrogatory 6 because it presumes that Telesphere has suffered damages, which is not a fact in evidence. Telesphere also argues that this interrogatory attempts to improperly shift the burden of proving Telesphere's damages to the defendants. Defendants object to Interrogatories 7 through 9 because they request further information regarding Interrogatory 6. Defendants further object to each of the requests because they contend that they require a legal conclusion.

13. We sustain the defendants' objections to Interrogatories 6 through 9. As we read them, the interrogatories assume facts not in evidence and improperly call for legal theories and conclusions by the defendants.

Interrogatories 10, 11, 12

14. Telesphere's Interrogatories 10 through 12 seek information regarding the defendants' liability for overearnings on an individual access category level.[13] Telesphere contends that by arguing that they are not liable for overearnings on an individual access category basis and that overearnings in one access category should be offset by underearnings in others, the defendants have placed these matters at issue. Telesphere asserts that the bases for the defendants' positions, including the parameters of their positions, are discoverable. In opposition to these interrogatories, the defendants argue that the requests are vague, irrelevant and call for legal conclusions.

15. We will also sustain the defendants' objections to Interrogatories 10 through 12. Telesphere once again appears to improperly seek information concerning the legal theories and rationale underlying the defendants' contentions.

Interrogatories 20, 21, 22, 23, 24, 28, 29

16. These interrogatories relate to Telesphere's allegations of unlawful accounting and affiliate transactions. In Interrogatories 20 through 24, Telesphere seeks identification of all transactions between the defendants and MECO from 1984 through 1988, including date, product/service, purchase prices from MECO and from unaffiliated vendors offering comparable products/services at that time.[14] In Interrogatory 28 Telesphere requests identification of all calculations performed by or on behalf of the defendants in instances where purchases from MECO were included to determine their rate bases from 1984 through 1988. Interrogatory 29 further requests identification of the amount by which the subject calculations would have changed if the purchases from MECO were appropriately accounted for and priced. Defendants objected on the grounds that Interrogatories 20 through 24 are irrelevant, overbroad, and burdensome and that Interrogatories 28 and 29 are vague, burdensome and irrelevant.[15] Defendants also objected to Interrogatories 28 and 29 on the grounds that they assume facts not in evidence and call for defendants to adopt Telesphere's theory of liability.

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[12] Interrogatory 6 requests defendants to "state whether NYT and NET contends that Telesphere's damages should depend upon the reasons why NYT's and NET's actual rates of return on switched traffic sensitive access services exceeded the target and allowable rates of return for these services...for the period from January 1, 1987 through December 31, 1988." Interrogatories 7 through 9 are follow-up requests regarding the information sought in Interrogatory 6.

[13] Telesphere's Interrogatory 10 requests defendants to "state whether NYT and/or NET contends that the rates they charge and their actual rates of return for interstate switched traffic sensitive access services are unlimited as long as their actual overall interstate rates of return do not exceed the allowable overall rate of return...". Interrogatories 11 and 12 are follow-up requests to Interrogatory 10.

[14] Interrogatory 20 requests the defendants to "Identify, by date, product and/or service, and purchase price recorded, each transaction in which NYT or NET purchased a product or service from MECO during the time period from January 1, 1984 through December 31, 1988." Interrogatories 21, 22, 23 and 24 seek related information concerning the cost to MECO, and the purchase price, of the products and services purchased by defendants, and the purchase prices of unaffiliated vendors for similar products and services.

[15] Defendants also objected to Telesphere's Instruction 11, which defines the relevant time period as January 1, 1982 through the present, unless otherwise stated. The interrogatories at issue request information outside of the relevant monitoring period. We sustain defendants' objections to Instruction 11 and confine Telesphere's information requests to the 1987-1988 monitoring period on which its complaints are based.

17. Telesphere contends that these interrogatories are designed to elicit transactional information relevant to its allegations that the defendants engaged in unlawful affiliate transactions with MECO and caused damage to Telesphere by including the excessive payments in their rate base. According to Telesphere, in order to prove its allegations, Telesphere must demonstrate that unlawful transactions did occur and were improperly allocated into the defendants' rate base. According to Telesphere, Interrogatories 28 and 29 go to the crux of its allegations that the defendants' improper accounting for affiliate transactions damaged Telesphere by overstating their net investment and operating expenses. Telesphere further contends that the defendants objected to the interrogatories but did not provide explanations in support of their objections. Telesphere argues that the Interrogatories are not burdensome on their face and that defendants' objections on that basis should be dismissed. Telesphere maintains that the information sought is highly relevant and limited to only transactions relating to its allegation of improper accounting for affiliate transactions.

18. In their opposition, the defendants maintained their objections. According to defendants, they engaged in hundreds of thousands of transactions with MECO during the five year period Telesphere cited in its interrogatories. Defendants contend that MECO conducts 80,000 transactions per month for its customers, and that its comptrollers group gathers 1.5 million billing records per year for the defendants. In addition, the defendants assert that they conduct a very significant volume of transactions with unaffiliated vendors. In sum, the defendants assert that to reconstruct each transaction would be a massive and burdensome undertaking, in addition to having to determine the purchase price of comparable services/products from unaffiliated vendors. Moreover, the defendants contend that the Commission fully addressed and resolved the issues raised by Telesphere's complaints with the issuance of the *Consent Decree Order*.[16]

19. Requiring responses to Interrogatories 20 through 24 would pose an undue burden upon the defendants. It appears that Interrogatories 20 through 24 will require the defendants to review and duplicate a voluminous amount of material to respond to these requests. We accept the defendants' representations that to do so would involve reviewing and copying a countless number of documents. Further, we cannot discern the probative value of the information Telesphere seeks regarding the prices for services or products of unaffiliated vendors for the period beginning 1984 through 1988. We find this request not only burdensome on its face, but also irrelevant to Telesphere's allegations of improper accounting practices by the defendants.

20. Finally, we will not require defendants to answer Interrogatories 28 and 29. Telesphere has failed to show that the information requested is relevant to a proper determination of the damages Telesphere seeks in these proceedings.[17]

V. CONCLUSION

21. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will afford complainant and defendants the opportunity to engage in further discovery in these proceedings pursuant to the timetable set forth herein. Additionally, we will establish a timeframe for the filing of briefs and reply briefs by complainant and defendants.[18]

VI. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that complainant's Motion to Compel IS DENIED.

23. IT IS FURTHER ORDERED that the complainant's Motion for Leave to Conduct Additional Discovery IS DENIED.

24. IT IS FURTHER ORDERED that, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 9 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

25. IT IS FURTHER ORDERED that the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 8 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

26. IT IS FURTHER ORDERED that complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

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[16] NET and NYT Opposition to Motion to Compel at 8.

[17] Additionally, Telesphere filed a motion for leave to conduct additional discovery, which requests an order allowing Telesphere to serve document requests concerning the defendants' answers to Interrogatories 25 and 26 and to take depositions concerning its affiliate transactions allegations. The defendants oppose the motions as serving no valid purpose. Defendants also state that the documents sought by Telesphere are a matter of public record, as they responded in the interrogatories. We are satisfied with the defendants' responses to Telesphere's interrogatories concerning affiliate transactions, which referenced documents that are publicly available. We further find that Telesphere has not shown that the information sought by the depositions are necessary to prove the damages that it seeks in these proceedings.

[18] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-160
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	File No. E-90-161
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-162
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-163
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-164
THE DIAMOND STATE TELEPHONE COMPANY,	File No. E-90-165
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-166
INDIANA BELL TELEPHONE COMPANY, INC.,	File No. E-90-167
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-168
THE OHIO BELL TELEPHONE COMPANY,	File No. E-90-169
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-170
NEVADA BELL TELEPHONE COMPANY,	File No. E-90-174
SOUTH CENTRAL BELL TELEPHONE COMPANY and	File No. E-90-176
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-177
Defendants.	

ORDER

Adopted: July 23, 1992; Released: August 3, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent complainant, Telesphere Network, Inc. (Telesphere), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.[1]

II. BACKGROUND

2. The case that Telesphere presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the

[1] On June 18, 1992, Swidler & Berlin, Chartered, counsel of record for Telesphere, filed a motion to stay these proceedings. The motion to stay has been dismissed. *See* Order, DA 92-938 (released July 20, 1992).

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[4] The complainants relied, as does Telesphere in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules for the relevant monitoring period. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

III. CONTENTIONS OF THE PARTIES

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Telesphere's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8]

5. Defendants raise a number of challenges to complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[9] Defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[10] and, therefore, unlawful. The majority of defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to complainant. In addition, some defendants maintain that the relevant rate of return is each company's overall rate of return, not individual access category rates of return.[11] Several defendants contend that an award of damages based on the measure advocated by complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*. One defendant argues that even assuming that violations of the Act and actual damages in consequence thereof can be established, it would be inequitable to award damages to Telesphere since Telesphere would not flow through such damages to its own customers.[12]

6. Telesphere has propounded interrogatories to each defendant requesting information related to the computation of its overearnings for each service and/or service segment that is the subject of Telesphere's complaints and information related to defendants' affirmative defenses. Defendants have answered some of the interrogatory requests and have objected to others. These interrogatories are currently the subject of motions to compel and related pleadings.[13]

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[6] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[8] Telesphere also seeks interest on this amount. We note that some defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] The issues and arguments raised by defendants in response to Telesphere's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[10] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[11] The Ameritech companies contend that the relevant overall interstate rate of return is that of Ameritech in the aggregate, not each of its component operating companies. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See, e.g.*, 5 FCC Rcd at 146 and 148 (1990). We find that the Commission's ruling is equally applicable to the defendants in these proceedings.

[12] *See, e.g.*, Motion to Dismiss of Nevada Bell at 6. We do not reach that issue in this interlocutory ruling. We are concerned here only with establishing a schedule for further discovery and briefing.

[13] Telesphere has also filed motions for procedural relief in the form of a status conference against The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, New Jersey Bell Telephone Company (collectively "Bell Atlantic"), Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company (collectively "Ameritech"), and Southwestern Bell Telephone Company ("Southwestern Bell"). The discovery schedule established in this Order renders these procedural motions moot and they will be dismissed accordingly.

Additionally, Telesphere filed motions for leave to take a deposition against Nevada Bell Telephone Company ("Nevada Bell"), South Central Bell Telephone Company ("South Central Bell"), and Southern Bell Telephone & Telegraph Company ("Southern Bell"), which were opposed. Telesphere has not shown that the information sought by the depositions is rel-

IV. DISCUSSION

A. Measure of Damages

7. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Telesphere may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Telesphere, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainant in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by defendants that would tend to show that Telesphere's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Telesphere's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute Telesphere's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

B. Motions to Compel

8. The argument proffered by several defendants that discovery regarding damages is premature is unavailing since we have decided not to adopt a bifurcated approach in these proceedings. Rather, as stated above, we have concluded that the parties' and the Commission's interests in obtaining the earliest practicable resolution of this matter will be better served by requiring the parties to develop a full record on the issues of liability and damages at this time. We will, therefore, address defendants' objections to Telesphere's interrogatories and will rule on Telesphere's motions to compel.

Interrogatories 1, 2, 3, 4, and 5

9. Interrogatories 1 through 5 request information regarding defendants' denial that their rates were unjust and unreasonable.[14] Only South Central Bell and Southern Bell answered these interrogatories without objection. The remaining defendants object to these interrogatories as being irrelevant and beyond the scope of the present proceeding since Telesphere's complaint made no allegation that defendants used inappropriate methodology or procedures in establishing their rates. Telesphere responds that the allegation of improper methodology and procedures is implied in the complaint and that such information is necessary to resolve an issue that defendants put at issue by denying that their rates were unjust and unreasonable.

10. We will not direct defendants to answer these interrogatories. Telesphere has not shown that the requested information is relevant or reasonably calculated to lead to the discovery of admissible evidence.

Interrogatories 6, 7, 8, and 9

11. Interrogatories 6 through 9 request information that Telesphere states would enable it to determine whether the defendants' position that their rates are just and reasonable is based upon a contention that their rates were not intentionally developed to violate the Commission's prescriptions.[15] Only Bell Atlantic answered these interrogatories without objection. The remaining defendants argue that the interrogatories either make the incorrect assumption that Telesphere has suffered damages or seek an admission that Telesphere has been damaged. These defendants also object to this set of interrogatories as an attempt to improperly shift Telesphere's burden of proving damages. Telesphere argues that it is entitled to determine precisely why defendants contend that their rates are just and reasonable and that these "contention interrogatories" are aimed at defining defendants' position.

12. We will not require defendants to answer these interrogatories. Telesphere has not shown that the requested information is relevant or reasonably calculated to lead to the discovery of admissible evidence. In addition, it appears that the interrogatories are not designed to discover facts but improperly call for legal theories of the defendants.

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evant or is reasonably calculated to lead to the discovery of admissible evidence. We will, therefore, deny Telesphere's motions for leave to take a deposition.

Finally, Telesphere replied to an opposition filed by Nevada Bell to Telesphere's deposition motion. Nevada Bell filed a motion to strike Telesphere's reply as being impermissible under the Commission's rules. We will grant Nevada Bell's motion to strike Telesphere's reply since a reply to a motion for additional discovery is prohibited under Section 1.730(b) of the Commission's Rules, 47 C.F.R. § 1.730(b).

[14] Interrogatory 1 requests a detailed description of the methodology used by defendants to establish rates. Interrogatories 2 and 3 ask for a detailed description of the procedures defendants used to monitor and make adjustments to those rates. Interrogatories 4 and 5 are follow-up requests to Interrogatories 1, 2, and 3.

[15] Interrogatory 6 requests defendants to state whether they "contend[] that Telesphere's damages should depend upon the reasons why [defendants'] actual rate of return on switched traffic sensitive access services exceeded the target and allowable rates of return for these services...for the period from January 1, 1987 through December 31, 1988." Interrogatories 7 through 9 are follow-up requests to Interrogatory 6.

Interrogatories 10, 11, and 12

13. Interrogatories 10 through 12 seek information regarding defendants' liability for overearnings on an individual access category level.[16] Ameritech, Southwestern Bell and Nevada Bell all object to this series of interrogatories. Ameritech argues that the interrogatories call for a legal conclusion. Southwestern Bell objects to the interrogatories as being beyond the scope of the proceeding and as calling for an answer to an inappropriate hypothetical. According to Nevada Bell the interrogatories are vague, compound and complex, call for speculation, and are irrelevant. Telesphere argues that it does not seek legal conclusions in these interrogatories, but only seeks the factual basis for the defendants' contentions. Telesphere also asserts that the bases for defendants' positions, including the parameters of their positions, are discoverable.

14. We will sustain defendants' objections to Interrogatories 10 through 12. Telesphere once again appears to improperly seek information concerning the legal theories and rationale underlying the defendants' contentions.

Interrogatories 13 and 14

15. Interrogatories 13 and 14 seek information concerning a defense raised by defendants that Telesphere's claim is barred by the statute of limitations contained in Section 415 of the Communications Act, 47 U.S.C. § 415.[17] Ameritech refuses to answer these interrogatories, arguing that they are vague since the term "adjustments" was undefined and no specific adjustments are identified. Telesphere maintains that the questions are relevant and clarifies that the term "adjustments" refers to all adjustments reflected in defendants' final monitoring report and to all rates of return reported therein. In their opposition to Telesphere's motion to compel, Ameritech further explains that these interrogatories are irrelevant to Ameritech's affirmative defense that the statute of limitations began to run when Telesphere purchased service at rates alleged to be unjust and unreasonable.

16. We will not require defendants to answer Interrogatories 13 and 14. Ameritech appears to have answered the requests with a further explanation of their affirmative defense and a more expanded answer is not required.

Interrogatories 16, 17, 18, and 19

17. Interrogatories 16 through 19 seek information about dollar amounts relevant to the computation of damages.[18] Ameritech argues that these interrogatories are irrelevant since Telesphere has the burden of proving damages, and that Ameritech's rates of return are overstated. Southwestern Bell generally objects to Interrogatories 17 through 19 as being irrelevant since there has been no finding of liability. South Central Bell and Southern Bell argue that Interrogatory 16 is premature in light of Telesphere's intention to bifurcate the proceeding and file a supplemental damages complaint. South Central Bell and Southern Bell also argue that Telesphere has the requested information readily available from its own billing records. Telesphere responds that having the burden of proof does not preclude discovery on an issue and that while the Commission will determine how damages are to be calculated, each party can present its position on the calculations. Telesphere responds to South Central Bell and Southern Bell that, regardless of what data it possesses, Telesphere is entitled to know what is in defendants' possession.

18. We will direct defendants to answer these interrogatories but only to the extent that we will require defendants to make available to complainant information necessary to compute the difference between the amount complainant actually paid for defendants' access services during the relevant monitoring period and the amount complainant would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. Defendants will have the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 7 herein.

Interrogatories 20 and 22

19. Telesphere addressed Interrogatories 20 and 22 only to Ameritech. The interrogatories seek information regarding Ameritech's defense that the only relevant rate of return is the return on prudently invested capital.[19] Ameritech answered Interrogatory 20 in part but argues that there are no established procedures for making the computations requested in the remaining parts of Interrogatory 20 or in Interrogatory 22. Telesphere argues that the computations are necessary in order for Telesphere to

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[16] Interrogatory 10 requests defendants to state if it is their contention that "the rates [they] charge[] and [their] actual rate of return for interstate switched traffic sensitive access services are unlimited as long as [their] actual overall interstate rate of return does not exceed the allowable overall rate of return...." Interrogatories 11 and 12 are follow-up requests for the same information sought in Interrogatory 10.

[17] Interrogatory 13 asks defendants if they contend that "the adjustments to rates of return made in [their] final rate of return monitoring report could have been determined from publicly available information before the final report was filed...." Interrogatory 14 is a follow-up question asking how these adjustments could have been determined.

[18] Interrogatory 16 asks for the amount of services purchased by Telesphere, identification of account numbers assigned to Telesphere and of all documents showing purchases. Interrogatories 17 and 18 request the dollar amount defendants' switched traffic sensitive access revenues would have to be reduced by in order for defendants' rates of return to yield 12.40 percent and the percentage that amount would be of defendants' actual total switched traffic sensitive revenues. Interrogatory 19 asks for the difference between the amount Telesphere purchased from defendants and the amount it would have paid if defendants had yielded rates of return at 12.40 percent for switched traffic sensitive access services.

[19] Interrogatory 20 requests that Ameritech identify all the reasons underlying its claim that the rates of return set out in Ameritech's Forms 492 are overstated, along with the precise computation that would correct the overstatement and the amounts by which the rates of return were overstated. Interrogatory 22 asks Ameritech to state the rates of return that it earned on prudently invested capital and the method used to ascertain that amount.

know how Ameritech came to the conclusion that the rates of return on switched access services are not excessive.

20. We will require Ameritech to answer Interrogatories 20 and 22 or present a full explanation why the requested information can not be produced from documents or records within its possession. Insofar as Ameritech has raised possible rate of return overstatements as a defense, it is reasonable to require it to produce in discovery facts and information underlying its claims. Moreover, the requested information could be relevant to the Ameritech's claims of offsets or other mitigation.

V. CONCLUSION

21. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will afford complainant and defendants the opportunity to engage in further discovery in these proceedings pursuant to the timetable set forth herein. Additionally, we will establish a timeframe for the filing of briefs and reply briefs by complainant and defendants.[20]

VI. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the complainant's Motions to Compel filed on September 17, 1990, September 19, 1990, and September 21, 1990, ARE GRANTED to the extent indicated herein and are otherwise DENIED. Defendants shall provide the information to complainant within 30 days of the release date of this Order.

23. IT IS FURTHER ORDERED that the complainant's Motions for Procedural Relief filed on October 4, 1990, ARE DISMISSED.

24. IT IS FURTHER ORDERED that Telesphere Network Inc.'s Motions for Leave to Take a Deposition filed on October 1, 1990, and October 4, 1990, ARE DENIED.

25. IT IS FURTHER ORDERED that Nevada Bell Telephone Company's Motion to Strike Reply to Opposition to Motions for Leave to Take Depositions filed on November 9, 1990, IS GRANTED.

26. IT IS FURTHER ORDERED that within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 18 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to the complainant within the thirty-day period.

27. IT IS FURTHER ORDERED that the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 7 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

28. IT IS FURTHER ORDERED that the complainant and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainant and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[20] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOM*USA, INC.,
Complainant,

v.

NEW YORK TELEPHONE COMPANY,	File No. E-91-175
CINCINNATI BELL TELEPHONE COMPANY, and	File No. E-91-176
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, Defendants.	File No. E-91-178

ORDER

Adopted: July 23, 1992; Released: August 3, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Telecom*USA, Inc. (Telecom*USA), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that Telecom*USA presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. CONTENTIONS OF THE PARTIES

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Telecom*USA's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services dur-

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied upon, as does Telecom*USA in the instant complaints, rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules for the relevant monitoring period. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

ing the period January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] The defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. The New York Telephone Company and the New England Telephone and Telegraph Company (collectively, "the NYNEX companies" or "NYNEX") maintain that they must be allowed to offset overearnings against underearnings.[10] Defendants contend that an award of damages based on the measure advocated by the complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*. Some defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to complainant when their overall interstate rates of return were below the authorized level.[11] CBT argues that even assuming that violations of the Act and actual damages in consequence thereof can be established, it would be inequitable to award damages to Telecom*USA because Telecom*USA would not flow through such damages to its own customers.[12]

6. Telecom*USA has propounded interrogatories to each defendant. The NYNEX companies stated objections, but answered the interrogatories. CBT opposed the interrogatory requests, which are currently the subject of a motion to compel and related pleadings.

IV. DISCUSSION

A. Measure of Damages

7. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Telecom*USA may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Telecom*USA, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainant in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that Telecom*USA's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Telecom*USA's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute Telecom*USA's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

8. We will require defendants to make available to complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 7 herein.

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[7] Telecom*USA also seeks interest on this amount. We note that Cincinnati Bell Telephone Company (CBT) argues that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by defendants in response to Telecom*USA's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] NYNEX Answer and Motion to Dismiss at 4.

[11] NYNEX Reply to Opposition to Motions to Dismiss at 4-5.

[12] CBT Motion to Dismiss at 8. We do not reach that issue in this interlocutory ruling. We are concerned here only with establishing a schedule for further discovery and briefing.

B. Motion to Compel

9. CBT objects generally to any discovery regarding damages because there has been no finding of liability. CBT's argument that discovery regarding damages is premature is unavailing since we have decided not to adopt a bifurcated approach in these proceedings. Rather, as stated above, we have concluded that the parties' and the Commission's interests in obtaining the earliest practicable resolution of this matter will be better served by requiring the parties to develop a full record on the issues of liability and damages at this time.

Interrogatory 1

10. Telecom*USA seeks to discover what percentage of CBT's total billings to all customers for interstate access service was billed to Telecom*USA. CBT objects on the grounds of relevance.[13] CBT further responds that the information sought either is in the possession of the complainant or its affiliates or is publicly available. CBT further responds that it is unreasonable and overly burdensome to ask for information and then ask CBT to mathematically manipulate it. Telecom*USA responds that under the holding in the *MCI Liability Order*, Telecom*USA can rely on the data in CBT's Form 492 to make out a *prima facie* case that CBT is liable and, therefore, Telecom*USA is entitled to the requested information in order to compute damages. Telecom*USA further responds that it is unable to analyze CBT's overall operations to determine the requested percentage. Finally, Telecom*USA responds that it will perform the division to which CBT objects if CBT will provide the dollar amounts for the numerator and denominator.

11. Telecom*USA's request appears reasonable and does not impose an undue burden upon defendant. We require CBT to provide either the dollar amount billed to Telecom*USA and the dollar amount billed to all customers for interstate access service during the relevant monitoring period or the percentage figure requested by Telecom*USA.

Interrogatories 2, 3, 4, and 5

12. Telecom*USA seeks to discover information regarding certain marginal tax rates applicable to CBT. CBT reiterates the objections it made to Interrogatory 1. Telecom*USA responds that the information sought is relevant and necessary to its calculation of damages.

13. We require CBT to provide the information requested in Interrogatories 2, 3, 4, and 5. We find that the information request is reasonable and the information sought appears to be relevant to the issue of damages.

V. CONCLUSION

14. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will afford the complainant and the defendants the opportunity to engage in further discovery in these proceedings pursuant to the timetable set forth herein. Additionally, we will establish a timeframe for the filing of briefs and reply briefs by complainant and defendants.[14]

VI. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that complainant's Motion to Compel Responses to Interrogatories filed on May 5, 1992 IS GRANTED to the extent indicated herein and is otherwise DENIED. Cincinnati Bell Telephone Company shall provide the information to complainant within 30 days of the release date of this Order.

16. IT IS FURTHER ORDERED THAT within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 8 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to complainant within the thirty-day period.

17. IT IS FURTHER ORDERED that the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 7 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

18. IT IS FURTHER ORDERED that the complainant and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[13] CBT does not claim that the information sought is irrelevant, but rather that complainant failed to establish relevance when propounding the interrogatory. Section 1.729(b) of the Commission's rules, 47 C.F.R. § 1.729(b), requires that parties on whom interrogatories are served answer each interrogatory without being ordered to do so by the Commission, or object. Therefore, it is proper to object to each interrogatory that is irrelevant or inquires into matters beyond the scope of the pleadings. However, the Commission's rules impose no duty on the party propounding the interrogatories to explain the relevance of each interrogatory before the served party is required to answer or object.

[14] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

Curly Thornton

against

ABC, CBS, Fox Broadcasting,
NBC, PBS, CNN, C-Span,
Democratic National Party,
Democratic National Committee,
and Carl Wagner

STAFF RULING

Adopted: July 22, 1992; Released: August 3, 1992

By the Chief, Mass Media Bureau:

1. The Bureau has before it an Application for Review filed January 23, 1992, by the above-listed complainant, seeking review of the Bureau's ruling in *Carl E. Person*, 6 FCC Rcd 7477 (1991). That ruling denied a complaint filed by Democratic Presidential Candidate Curly Thornton against ABC, CBS, Fox Broadcasting, NBC, PBS, CNN, C-Span, Democratic National Party, Democratic National Committee, and Carl Wagner alleging violation of Sections 315(a) and 312 (a)(7) of the Communications Act, as amended, 47 U.S.C. Sections 315(a) and 312(a)(7), and the fairness doctrine.

2. The Application for Review was not timely filed pursuant to 47 C.F.R. Section 1.115. Section 1.115(d) requires that Applications for Review be filed no more than thirty days after public notice of the relevant action. For non-rulemaking documents, such as the Bureau's decision, public notice of the action is the release date. 47 C.F.R. Section 1.4(b)(2). The Bureau's decision was released on December 20, 1991, but the Application for Review was not received by the Commission until January 23, 1992, two days after the thirty-day period had expired.

3. In view of the foregoing, the Application for Review IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 331
of the Communications Act
of 1934

POLICY STATEMENT

Adopted: July 24, 1992; **Released: August 3, 1992**

By the Commission:

I. BACKGROUND

1. In accordance with P.L. 102-243, 105 Stat. 2394, approved December 20, 1991, Section 331 of the Communications Act of 1934 (47 U.S.C. 331) was amended by adding new subsection (b) to establish a new policy regarding AM radio stations.[1] The Commission was directed to ensure that the licensee of an AM daytime-only station in a community with a population of more than 100,000 persons that lacks a local full-time aural station licensed to that community and that is located within a Class I station primary service area would be given the opportunity to provide full-time service to that community, if so requested by the licensee and if technically feasible. A review of Commission records indicates that, issues of technical feasibilty aside, fewer than ten licensees are of the type specified under the provisions of new Section 331(b). In light of this small number, we intend to handle these on an *ad hoc* basis rather than enacting general rules.

II. POLICY

2. Upon notification in writing by a qualifying licensee that it seeks to provide full-time service, the Commission's Mass Media Bureau will work with the licensee to determine how best to provide such service. The Bureau will consider the following possibilities:

A. An upgrade to full-time service on the licensee's current channel;

B. An upgrade on an adjacent channel (that is, within three channels of the existing channel);

C. An upgrade on any other AM channel including the ten new channels recently added to the AM band.

3. In this process, we believe the preferable way to proceed is to entertain proposals from qualified licensees, to evaluate those proposals in light of statutory requirements and to consider, where appropriate, feasible alternatives. By proceeding in this fashion we will be able to examine a variety of opportunities which may have arisen from changes in our regulations and the operations of other AM stations, and to devise a solution which satisfies the Act and, where possible, the needs of all affected parties. This will enable us to bring new full-time aural service to the public in the quickest way possible.

4. Once an appropriate solution has been identified, we will offer the licensee the opportunity to file an application to make the necessary modifications to its existing operations. Consistent with the statutory directive, this application will not be subject to competing or mutually exclusive applications but must otherwise conform to the established rules and regulations governing the AM broadcast service, including cut-off and other procedural rules, except as may be waived by the Commission in accordance with appropriate legal standards.

5. A number of parties have requested that the Commission reconsider various decisions it made in its recent AM improvement proceeding, including the use of the ten new channels. In the course of our reconsideration we will reexamine the rules and policies we adopted to ensure that they are consistent with the effective implementation of Section 331(b) of the Communications Act of 1934.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[1] Section 331 of the Communications Act of 1934 was amended by adding at the end the following new subsection:

"(b) AM Radio Stations. --It shall be the policy of the Commission, in any case in which the licensee of an existing AM daytime-only station located in a community with a population of more than 100,000 persons lacks a local full-time aural station licensed to that community and that is located within a Class I station primary service area notifies the Commission that such licensee seeks to provide full-time service, to ensure that such a licensee is able to place a principal community contour signal over its entire community of license 24 hours a day, if technically feasible. The Commission shall report to the appropriate committees of Congress within 30 days after the date of enactment of this Act on how it intends to meet this policy goal."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Red Greensboro F Partnership — File No. 9940-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service Station on F-group channels at Greensboro, North Carolina

ORDER ON RECONSIDERATION

Adopted: July 21, 1992; Released: August 3, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* Red Greensboro F Partnership (Red) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) of Red's application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Greensboro, North Carolina, and for reinstatement of the application.

2. *Background.* As the result of a Commission lottery, Red's application was selected for qualification review. Subsequently, Division staff initiated a qualification review of this application, pursuant to 47 C.F.R. Sec. 21.32, and upon examination, found the application contained several deficiencies that precluded the staff from making a finding that Red was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of the application would serve the public interest. Red was notified by letter of these deficiencies[1] and was provided with an opportunity to cure them within thirty (30) days of the date of the letter. In the deficiency letter, Red was also advised that failure to file timely the requested information could result in the dismissal of its application.

3. Over a period of three years, and on seven different occasions, Red provided some of the information necessary to complete processing of its application and repeatedly requested extensions of time to provide the required information. Pursuant to 47 C.F.R. Secs. 21.13 (c), 21.20(d) and 21.28(d), and by letter dated almost four (4) years after the deficiency letter, the Division dismissed, without prejudice, Red's application for failure to comply in a timely manner with the Division's request for information.[2]

4. *Petition.* Red submitted a petition for reconsideration of the dismissal action. Red argues that dismissal was unwarranted because each of its partners filed a financial statement prior to the lottery and because, prior to the deficiency letter, Red had submitted a statement from an agent of the owner of an alternative transmitter site regarding the "option" or possibility of Red leasing the alternative site. Red also claims that, prior to dismissal, the Division should have written a second deficiency letter requesting that Red submit the required information.

5. *Discussion.* As of the date of the Division's dismissal action, almost four years after the Division's request for information, Red still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. In contrast to the claims made in Red's petition, Red stated that "[a]s [the Division's] files will indicate, the ... application ... is pending and further response to the Commission's deficiency letter is required prior to grant" and acknowledged, "[t]he above ... is one of a number of pending applications at the Commission which require further amendment prior to grant." However, contrary to these representations, Red, in effect, is now arguing that at the time this letter was submitted to the Commission, Red did not have to file a "further response to the ... deficiency letter" and "further amendment prior to grant" was not required. We disagree.

6. Despite Red's claim to the contrary, it had not submitted a lease, lease option agreement or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by 47 C.F.R. Sec. 21.15(a).[3] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, option agreement or other concrete evidence of site availability must be submitted. *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.)*

7. According to Red's petition, an "option" had been submitted. This "option" consisted of a letter from Red's attorney to the engineer employed by the owner of an alternative transmitter site. We disagree with Red's characterization of this document as a lease "option" agreement. Instead, it is a statement of expectation that

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[1] The deficiencies cited were the absence of: (1) a lease or lease option agreement pursuant to 47 C.F.R. Sec. 21.15(a); (2) current financial qualification data pursuant to 47 C.F.R. Sec. 21.17; (3) antenna structure height; (4) a non-affiliation statement pursuant to 47 C.F.R. Sec. 21.900; (5) an Instructional Television Fixed Service (ITFS) non-interference analysis pursuant to 47 C.F.R. Sec. 21.902(i); and (6) required information on station maintenance and emergency repairs, pursuant to 47 C.F.R. Sec. 21.15(e) and FCC Form 435 item 18.

[2] The last requested extension period ended more than eight (8) months prior to dismissal.

[3] Even if Red was not required to comply with the requirements of Section 21.15(a), it was required pursuant to 47 C.F.R. Sec. 21.13(c) to submit a lease or option agreement after the Division stated in the deficiency letter that a lease or option agreement was required for qualification review purposes and requested Red to submit it. Section 21.13(c) provides *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

negotiations will occur at some unspecified future date, if space is still available at that time, and an expression of hope that the two parties will be able to agree on contract terms and will be able to do business with each other. Under this statement, the site owner is free to lease, or reserve for lease, all remaining space at the site to others, leaving no space available for Red. It lacks the legal indicia of a contract. For example, neither party is bound; neither party is liable for damages for breach; specific performance cannot be enforced; terms are not specified, not even the expiration date of the "option;" and no consideration was paid. Thus, we find that Red failed to demonstrate "concrete evidence" of the availability of the site.[4]

8. In addition, Red failed to submit the requested current financial qualification data prior to dismissal. According to Red, approximately three (3) months prior to the deficiency letter, each of Red's partners signed a partnership agreement. The agreement provided that each partner "is responsible for and has sufficient funds available to satisfy its pro rata obligation for the amount necessary to construct and operate the proposed MMDS system for one year, as specified in the designated surviving application." This financial pledge of each partner to the other, does not, however, meet the financial standards at that time set forth in 47 C.F.R. Sec. 21.17(b). At the time the partnership agreement was signed and at the time the deficiency letter was written, Section 21.17(b) required that each applicant provide a balance sheet demonstrating that its current liquid assets were sufficiently greater than its liabilities to pay for construction and operation for one year of the proposed MMDS station. The Division reviewed the balance sheets and financial data previously submitted by Red, including the partners' pledges to each other, and determined that Red had failed to demonstrate its financial qualifications. Red has presented no persuasive reason to reverse the Division's previous financial determination. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm.Car.Bur. 1988).

9. Red had a duty to submit timely curative amendments to its application as directed by the Division. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for almost four years substantially impeded the expeditious offering of MMDS at Greensboro. Also, Red's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act of 1934, as amended. *See By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of dismissal, Red had not provided the required financial data or certification, or the required lease or option agreement. The Division was not in a position, therefore, to complete evaluation of Red's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm.Car.Bur. 1990).

10. *Conclusion.* Having carefully considered all of the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified.

11. *Ordering Clause.* Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Red Greensboro F Partnership IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[4] We also note that Red failed to submit an option with its petition for reconsideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 90-287

In the Matter of

Northern California Region 6
Public Safety Plan

ORDER

Adopted: July 22, 1992; Released: August 3, 1992

By the Chief, Land Mobile and Microwave Division and the Acting Chief, Spectrum Engineering Division:

1. The Private Radio Bureau and the Office of Engineering and Technology, acting under delegated authority, accepted the Northern California (Region 6) Public Safety Plan (Plan) on November 20, 1990, 5 FCC Rcd 7123 (1990).

2. By letter dated March 16, 1992, the Region proposed to amend its Plan. The proposed amendment would revise the current channel allotments and add criteria to ensure appropriate use of vacated channels. The Commission placed the letter on Public Notice for comments on May 12, 1992, 7 FCC Rcd 3144 (1992). The Commission received three comments, all of which urged the Commission to approve the proposed amendment.

3. We have reviewed the proposed amendment to the Region 6 Plan and, having received no comments to the contrary, conclude it furthers the interests of the eligible entities within the Region.

4. Accordingly, IT IS ORDERED, That the Public Safety Radio Plan for Northern California (Region 6) IS AMENDED, as set forth in the Region's letter of March 16, 1992. This Amendment is effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile & Microwave Division

William R. Torak
Acting Chief, Spectrum Engineering Division

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-71

In re Applications of

WILLIAM E. FITTS	File No. BPH-890913MJ
PATRICIA A. KORN	File No. BPH-890914MR
SOTO, INC.	File No. BPH-890914NL

For Construction Permit for
New FM Station, Channel 228C,
Laughlin, Nevada

Appearances

Robert L. Olender and *Alan E. Aronowitz* on behalf of William E. Fitts; *Jerrold Miller* on behalf of Patricia A. Korn; and *Katrina Renouf* on behalf of Soto, Inc.

DECISION

Adopted: July 23, 1992; Released: August 4, 1992

By the Review Board: MARINO (Chairman), ESBENSEN and GREENE.

Board Member GREENE:

1. In an *Initial Decision*, 7 FCC Rcd 1883 (1992) (*I.D.*), Administrative Law Judge Walter C. Miller (ALJ) granted the application of William E. Fitts (Fitts) for a construction permit for a new FM broadcast station at Laughlin, Nevada, and denied the competing applications of Patricia A. Korn (Korn) and Soto, Inc. (Soto). This proceeding is now before the Review Board on exceptions filed by Korn and Soto. Because oral argument would not materially assist the Board in resolving the questions here presented, Soto's request for oral argument will be denied. *See* 47 CFR § 1.277(c).

BACKGROUND

2. The *I.D.* found Fitts to be the superior applicant under the standard comparative issue, the only issue tried by the ALJ. *See Policy Statement*, 1 FCC 2d 393 (1965) (*1965 Policy Statement*). The *I.D.* awarded Fitts, an individual applicant, 100% integration credit for his proposal to serve as the general manager of his proposed facility on a full-time basis. *I.D.*, ¶¶ 5, 12 (Findings), 8 (Conclusions). Korn, also purportedly an individual applicant, was denied integration credit because her proposal was found to lack *bona fides* due to the overarching involvement of her spouse, Dennis Korn. *Id.* ¶¶ 5, 19-39 (Findings), 9-10 (Conclusions). The *I.D.* accorded Soto only 10% integration credit to reflect the participation of Julia S. Zozaya, the applicant's 90% nonvoting stockholder and 10% voting stockholder, who proposed no integration. *Id.* ¶¶ 5-6, 47-56 (Findings), 11-12 (Conclusions).

3. Soto excepts to the *I.D.'s* inclusion of its nonvoting stock interests in the ALJ's calculation of Soto's integration credit. Soto asserts that it should have received 90% credit for the proposed integration of its 90% voting stockholder Stephen M. Zozaya, III, who also holds 10% of the corporation's nonvoting stock. Neither Soto nor Korn excepts to the award of 100% quantitative integration credit to Fitts. Korn also does not except to the *I.D.*'s denial of integration credit to Korn but excepts only to its reliance on the integration criterion, as currently configured, as the basis for deciding the case.[1] For the reasons described below, we affirm the grant of Fitts' application.

SOTO, INC.

4. The *I.D.* set forth Soto's structure as follows:

> *Soto, Inc.*, a Nevada corporation, has two stockholders and two classes of common stock. Ste[ph]en M. Zozaya III is Soto's President and a director. He owns 900 shares of voting and 100 shares of nonvoting stock. His grandmother, Julia S. Zozaya is Soto's Secretary and a director. She owns 100 shares of voting and 8900 shares of nonvoting stock. So Ste[ph]en Zozaya has 90% of Soto's voting power, but his grandmother owns 90% of the corporation.

I.D., ¶ 5 (Findings); *see also* Soto Exh. 1. Stephen Zozaya proposes full-time integration at Soto's Laughlin station; Julia Zozaya proposes none. *I.D.*, ¶ 47 (Findings); Soto Exh. 3.

[1] Citing *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir.), *pet. for cert. pending on other grounds sub nom. Galaxy Communications, Inc. v. FCC*, No. 91-1744 (Apr. 30, 1992), and *Reexamination of the Policy Statement on Comparative Broadcast Hearings* (Notice of Proposed Rule Making), 7 FCC Rcd 2664 (1992), Korn argues that the continuing validity of the integration criterion, the decisive factor in this case, is uncertain. Br. at 2. Thus, "any decision in this proceeding must await the Commission's reconsideration of its comparative criteria. "*Id.* The Commission has clearly stated, however, that any revision of its comparative criteria would apply only to applications not yet in hearing status. *Reexamination*, 7 FCC Rcd at 2669. In *Anchor Broadcasting Limited Partnership*, FCC 92-300, ¶¶ 11, 18-22, released July 21, 1992, the Commission affirmed its earlier application of the comparative criteria in *Bechtel*, noting that pending cases would *not* be held in abeyance pending completion of the reexamination proceeding. It further appears that the court condones the continued application of the criteria as a basis for deciding comparative cases during this interim period. *See Rebecca L. Boedker v. FCC*, No. 91-1277 (D.C. Cir. Apr. 24, 1992), *aff'g by judgment* 6 FCC Rcd 2557 (1991) (applicant prevails based on preference received under the unified local residence/civic activity factor). Accordingly, Korn's exception will be denied. Because Korn receives no integration credit, her application need not be considered further. *See* 47 CFR § 1.277(a).

5. The *I.D.* makes detailed findings regarding the formation of Soto and the preparation of its proposal, and determines that Julia Zozaya "has been the driving force behind Soto's application." *I.D.*, ¶ 48 (Findings). *See also id.* ¶¶ 49-54 (Findings). The *I.D.* concludes:

> Based on the foregoing findings Soto, Inc. will only be awarded only 10% quantitative integration, an amount consistent with Stephen Zozaya's 10% equity in the corporation. Soto, Inc. has failed to demonstrate that Julia Zozaya's involvement will be limited to and consistent with her 10% voting interest. Conversely, Soto has also failed to demonstrate that Stephen Zozaya will exercise a control of the station that is consistent with his 90% voting interest. The record facts show otherwise.

Id. ¶ 55 (Findings) (citation omitted); *see also id.* ¶¶ 11-12 (Conclusions).

6. In its exceptions, Soto contends that "[u]nanimous precedent and his own findings of fact required the A.L.J. to credit Soto's 90% integration pledge, making that applicant the comparative winner." Br. at 8. Citing *McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269 (Rev. Bd. 1990),[2] and a host of other cases, Soto argues that unless the totality of the record evidence suggests that the applicant is a sham, Commission precedent dictates that only the *voting* ownership of the applicant should be included in the analysis of the applicant's integration proposal. Br. at 9-10. Here, according to Soto, there is no evidence indicating that Soto's structure is not *bona fide* or that its integration proposal will not be implemented. *Id.* at 11-14. Without that necessary factual predicate, Soto continues, the *I.D.* erroneously attributed the nonvoting stock interest of Julia Zozaya in its calculation of Soto's integration credit. Finally, Soto disputes the *I.D.'s* conclusion that it has not adequately demonstrated that Stephen Zozaya will be in control of the applicant and that Julia Zozaya will not be. *Id.* at 13-19.

7. *Discussion:* The Commission has previously had occasion to consider the integration credit due applicants whose structures feature simultaneous ownership of voting and passive interests by single applicant principals -- either general partners who also hold limited partnership interests or voting stockholders with nonvoting stock shares. In *Cotton Broadcasting Company*, 4 FCC Rcd 1781 (1989), the Commission considered the proposal of an applicant, The L Broadcasting Company (LBC), comprised of three general partners with 10% of the equity, where one of the general partners, Evelyn J. Barber, also held the remainder of the applicant's 70% equity as a limited partner. The Commission credited LBC's proposal, concluding that:

> [T]he interests of a person who is both a limited and a general partner will be attributed to the applicant, because it would be impossible to provide the insulation required to demonstrate the separation of the general and limited partnership interests specified in our ownership attribution rules. We therefore reverse the Board's ruling [denying integration credit] and credit LBC for Mrs. Barber's integration proposal as a general partner.
>
> This ruling, in addition to affecting diversification as a comparative factor, will increase the relative weight accorded to the person holding both general and limited partnership interests for integration purposes, by increasing the interests scrutinized in the comparative process to include attributable limited partnership interests....Combining Mrs. Barber's general and limited partnership interests would give her an 80 percent interest in the applicant and would leave [the other general partners] with only 10 percent interests, respectively.

4 FCC Rcd at 1782. The *Cotton* principle was later extended to two-tiered corporations in *Las Americas Communications, Inc.*, 6 FCC Rcd 1507, 1513 n.27 (1991), *rev. dismissed*, 7 FCC Rcd 2625 (1992), and *Ronald Sorenson*, 6 FCC Rcd 6901, 6901 (1991), *appeal docketed*, No. 91-1208 (D.C. Cir. May 2, 1991).[3]

8. In view of the foregoing, Soto may receive, at most, 10% quantitative integration credit, irrespective of Julia Zozaya's role in Soto's application and regardless of whether or not she controls the applicant. Because Stephen and Julia Zozaya own shares of both voting and nonvoting stock, it is not possible to separate their commingled active and passive ownership interests for purposes of the Commission's insulation requirements. *See Cotton*, 4 FCC Rcd at 1782; *Sorenson*, 6 FCC Rcd at 6901. Thus, the total interests of each stockholder owning both voting and nonvoting shares must be attributed. Because only Stephen Zozaya, Soto's 10% owner, proposes integration, Soto may receive 10% integration credit. Based on the substantial quantitative disparity between Fitts (100% integration credit) and Soto (10% credit), Fitts prevails, regardless of Soto's qualitative attributes.[4] *See, e.g., Coastal Broadcasting Partners*, ¶¶ 7 FCC Rcd 1432, 1437 n.16 (1992); *Miracle Strip Communications*, 4 FCC Rcd 5064, 5065-66 (1989).

9. ACCORDINGLY, IT IS ORDERED, That the application of William E. Fitts (File No. BPH-890913MJ) for a construction permit for a new FM broadcast station on Channel 228C at Laughlin, Nevada, IS GRANTED, and the applications of Patricia A. Korn (File No. BPH-890914MR) and Soto, Inc. (File No. BPH-890914NL) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

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[2] *Rev. denied*, 6 FCC Rcd 2347, *recon. dismissed sub nom. Spectrum Broadcasting Corp.*, 6 FCC Rcd 5183 (1991).

[3] *Cotton* was most recently applied to a two-tiered corporation in *Opportunity Broadcasting of Shreveport*, 7 FCC Rcd 3382 (1992), where the Review Board adjusted the comparative enhancements credited to an applicant whose integrated voting shareholders also held nonvoting stock interests.

[4] The *I.D.* found no differences between Fitts, Korn, and Soto under the diversification or coverage criteria. *I.D.*, ¶¶ 4, 7 (Conclusions).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION SERVICES, INC.,
Complainant,

v.

NEW YORK TELEPHONE COMPANY, and — File No. E-90-183
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, — File No. E-90-184
Defendants.

ORDER

Adopted: July 23, 1992; Released: August 3, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Allnet Communication Services, Inc. (Allnet), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription and affiliate transaction rules for the period January 1, 1987 through December 31, 1988. In addition to alleging that defendants overearned for the period January 1, 1987 through December 31, 1988, Allnet also alleges that defendants improperly allocated the costs of unlawful affiliate transactions, lobbying, and litigation expenses in their interstate revenue requirement.

II. BACKGROUND

2. The case that Allnet presents against the defendant local exchange carriers (LECs) is similar, in large part, to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases largely parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[5]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Allnet's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[6]

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does Allnet in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[6] Allnet also seeks interest on this amount as well as attorney's

5. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. The defendants argue that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[7] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rates of return were below the authorized level. Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. The defendants contend that there is no significant difference between an award of damages based on the measure advocated by the complainant and the automatic refund rule found unlawful in *AT&T v. FCC*. In addition, defendants argue that even if they included unlawful costs of unlawful affiliate transactions in their regulated rates, the Commission has previously prescribed an exclusive remedy for any overcharges resulting from such actions.[8]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Allnet may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Allnet, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels or unlawful affiliate transactions. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that Allnet's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Allnet's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute Allnet's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the parties the opportunity to develop further evidence consistent with the guidelines stated herein. The defendants, for example, may develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein for the relevant monitoring period. Finally, we will establish a timeframe for the filing of briefs and reply briefs by complainant and defendants.[9]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed

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fees. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[7] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,034 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[8] Motion to Dismiss at 11, *citing* In the Matter of New York Telephone Co. and New England Telephone and Telegraph Co. Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, *Order to Show Cause and Notice of Apparent Liability for Forfeitures*, 5 FCC Rcd 866 (1990) at para. 32, where the Commission proposed to direct the defendants to make a one-time reduction of interstate revenue requirements in their 1990 Annual Access Tariff Filing.

[9] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED that the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED that complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-17

In the Matter of

Amendment of Section 90.631 of the Commission's Rules and Regulations Concerning Loading Requirements for 900 MHz Trunked SMR Stations — RM-7827

REPORT AND ORDER

Adopted: July 22, 1992; Released: August 4, 1992

By the Commission:

I. INTRODUCTION

1. This *Report and Order* amends Part 90 of the Commission's Rules to grant Specialized Mobile Radio (SMR) licensees in the 896-901/935-940 MHz (900 MHz) band limited relief from the loading requirements of Section 90.631(b) of the Rules, 47 C.F.R. § 90.631(b). Specifically, we extend the deadline for loading all 900 MHz SMR systems by granting all qualified licensees that have not met our loading requirements a two-year license renewal at the end of their initial license period. We relieve these licensees from our loading requirements until the expiration of the two-year period.

II. BACKGROUND

2. We authorize trunked systems on the basis of a loading criterion of 100 mobile stations per channel. If at the end of five years a trunked system is not loaded to a level of 70 mobiles per channel and all channels in the licensee's service category are assigned within its geographic area, authorization for channels not loaded to 100 mobile stations per channel cancels automatically.[1]

3. In 1987, we began licensing the 399 channels in the 900 MHz band, following procedures established in Gen. Docket No. 84-1233[2] and a November 4, 1986 Public Notice entitled "Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands."[3] Two hundred of these channels were set aside for SMR operations. To expedite 900 MHz SMR service to areas most in need, we accepted applications only within 46 designated filing areas (DFAs) encompassing the 50 top markets in the country.

4. We have granted licenses for SMR systems in all DFAs except San Diego, California, where no licenses have been granted pending negotiations with Mexico on the use of these channels. Many licensees have failed to construct and place their systems in operation within the one-year period prescribed by Sections 90.631(e) and (f) of our Rules; their authorizations have cancelled automatically and their channels have been recovered. Licensees that have completed construction and placed their stations in operation within the required one year are now subject to the loading requirements of Section 90.631(b).[4]

5. On February 18, 1992, we released a *Notice of Proposed Rule Making* (*Notice*)[5] proposing limited relief from our loading requirements for 900 MHz SMR licensees.[6] Noting that our multi-phase licensing scheme was designed to expedite licensing in the major metropolitan areas, we expressed concern that this scheme may have placed 900 MHz SMR licensees at a competitive disadvantage to 800 MHz licensees, by making it difficult to develop the types of wide-area and regional systems characteristic of current, competitive (800 MHz) SMR offerings. We concluded that the circumstances justified limited relief from our loading standards and proposed a two year renewal for qualified 900 MHz licensees, with loading requirements not enforced until the expiration of this two-year period. Our proposed relief was limited to licenses granted during the first two years of licensing when, we concluded, difficulties in establishing the new service were greatest.

6. Seven comments were filed in response to the *Notice*, all favoring the proposed limited relief.[7] One commenter, NABER, asks that relief be extended to all 900 MHz SMR licensees, rather than just those licensed during the first two years. A second, SIRSA, seeks relief from our loading standards for 900 MHz Industrial/Land Transportation system licensees as well. AMTA, finally, asks that we permit inter-category sharing at 900 MHz between the SMR and the Business and Industrial/Land Transportation pools.

III. DISCUSSION

7. Based on the record before us, we will extend relief from the requirements of Section 90.631(b) to all current 900 MHz SMR licensees for a two-year period. Our multi-phase licensing scheme has limited 900 MHz SMR systems to artificially defined markets and has precluded a free selection of sites in each market. As a result, licensees have been unable to develop the kind of wide-area services

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[1] Section 90.631 of the Commission's Rules, 47 C.F.R. § 90.631.

[2] Report and Order, Docket 84-1233, 2 FCC Rcd 1825 (1986).

[3] Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, 1 FCC Rcd 543 (1986).

[4] All licensees authorized after June 1, 1993, however, will not be subject to this condition. *See* § 90.631(b).

[5] Notice of Proposed Rule Making, PR Docket No. 92-17, 7 FCC Rcd 1400 (1992).

[6] The National Association of Business and Educational Radio, Inc. (NABER) had filed a petition for rule making (RM-7827) to extend the loading deadline for certain 900 MHz licensees by two years.

[7] Comments in this proceeding were due on March 11, 1992, and reply comments on March 23, 1992. Comments were filed by Advanced Mobilecomm, Inc.; American Mobile Telecommunications Association, Inc. (AMTA); Fleet Call, Inc.; Millicom Radio Telephone Company, Inc.; National Association of Business and Educational Radio, Inc. (NABER); Special Industrial Radio Service Association, Inc. (SIRSA); and U.S. Mobilenet. No reply comments were filed.

expected by today's private radio customers.[8] The constraints of our licensing policies have placed 900 SMR licensees at a competitive disadvantage to at least 800 MHz SMR licensees in designing and marketing their systems. It is appropriate to provide them additional time to load their systems under these circumstances.

8. We will, therefore, as of the effective date of this Report and Order, process the license renewal applications of 900 MHz SMR licensees as follows. Licensees that have met the loading requirements of Section 90.631(b) at the end of the initial five-year license term may apply for and be granted a standard five-year license renewal. Those that have not, may request and be granted a two-year license renewal. At the end of this time period, such licensees will be subject to the channel recovery provisions of Section 90.631(b).

9. Our original proposal limited relief to systems licensed on or before June 30, 1989. We reasoned that the difficulties of establishing new systems were greatest during the first two years of licensing, and that subsequent licensees would have had the benefit of previous licensees' experiences. NABER questions our reasoning, expressing concern that this limitation would be unfair to later licensees who, in NABER's opinion, face the same difficult conditions as did licensees with earlier grants. Further, NABER argues, our proposal could result in licensees in larger markets, where demand might be greater, having later loading dates than licensees in smaller markets.[9]

10. We will adopt NABER's suggestion. The scope of relief here is purely a matter of discretion; no legal or factual constraints compel one course over the other. We have examined the record in this light and, finding no strong reason to limit the number of licensees entitled to relief, conclude that extending relief to all current 900 MHz SMR licensees is the more equitable course of action. We will not, as originally proposed, limit relief to licensees granted during the first two years of 900 MHz SMR licensing.

11. We reject the other suggested modifications to our proposal, however. Our *Notice* specifically considered and declined to adopt a proposal by SIRSA to extend relief to licensees in the 900 MHz Industrial/Land Transportation pool. There, we stated that such licensees do not compete for customers and should only apply for enough channels to satisfy their actual needs.[10] SIRSA attempts here to equate Industrial/Land Transportation licensees with 900 MHz SMR licensees, by citing common problems with equipment acquisition and economic recession.[11] Such problems are, however, endemic to any new service offering and are not sufficiently unusual to justify special treatment. What is "unique" is the licensing scheme adopted for 900 MHz SMR licensees, and the effect of this scheme on their competitive position vis-a-vis other providers of commercial land mobile service. Industrial/Land Transportation licensees were not subject to the geographic limitations of SMR licensing and thus they do not share this burden.

12. AMTA's request for inter-category sharing at 900 MHz between the SMR and the Business and Industrial/Transportation pools[12] is dismissed as beyond the scope of this proceeding. This issue is best considered in connection with the issue of SMR access to the 900 MHz band as a whole.[13]

IV. CONCLUSION

13. We adopt rules in this proceeding that provide limited relief from our loading requirements for 900 MHz SMR licensees. The record clearly indicates that these licensees have been disadvantaged competitively by our licensing scheme for their frequencies. The record also supports the relief proposed and adopted.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

Need and purpose of this action:

14. The Commission is adopting this *Report and Order* to provide limited relief for 900 MHz SMR licensees who have been disadvantaged by our multi-phase licensing scheme for their frequencies. This scheme has limited the licensees' ability to design and market systems competitive with other SMR offerings. This action provides additional time to load the systems, in recognition of these difficulties.

Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

15. No comments addressed our Initial Regulatory Flexibility Analysis.

Significant alternatives considered and rejected:

16. None.

VI. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 90 of the Commission's Rules, 47 C.F.R. Part 90, IS AMENDED as set forth in the Appendix.

18. IT IS FURTHER ORDERED that this *Report and Order* will be effective thirty days after publication in the Federal Register.

19. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

20. For information regarding this *Report and Order*, contact Myra G. Kovey, Private Radio Bureau, at (202) 632-6497.

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[8] *See, e.g.*, AMTA Comments at 3-5; Fleet Call Comments at 3-5.

[9] NABER Comments at 4-5.

[10] Notice, *supra*, 7 FCC Rcd at 1401.

[11] SIRSA Comments at 6-8.

[12] AMTA Comments at 6-8.

[13] *Accord* Report and Order, PR Docket No. 87-213, 67 RR 2d 1473, 1485-86 (1990).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Part 90 is amended as follows:

1. The authority citation for Part 90 reads as follows:

Authority: Sections 4, 303, 331, 48 Stat. 1066, 1082, as amended; 47 U.S.C. § 154, 303, and 332, unless otherwise noted.

2. Section 90.631 is amended by revising paragraph (b), and by adding a new paragraph (i), to read as follows:

§ 90.631 Trunked systems loading, construction, and authorization requirements.

* * * * *

(b) Each applicant for a trunked system shall certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant. Except as provided in paragraph (i) of this section, if at the end of five years a trunked system is not loaded to the prescribed levels and all channels in the licensee's category are assigned in the system's geographic area, authorization for channels not loaded to 100 mobiles per channel cancels automatically. If a trunked system has channels from more than one category, General Category channels are the first channels considered to cancel automatically. All licensees who are authorized initially before June 1, 1993, and are within their original license term or are within the term of a two-year authorization granted in accordance with paragraph (i) of this section are subject to this condition. A licensee that has had authorized channels cancelled due to failure to meet the above loading requirements will not be authorized to obtain additional channels to expand that same system for a period of six months from the date of cancellation.

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(i) For SMRS category trunked systems licensed in the 896901/935-940 MHz band, if at the end of the initial five-year license term the licensee of such a trunked system has not satisfied the loading requirements of paragraph (b) of this section, the licensee requesting renewal of its license will be granted a renewal for only a two-year period. Regardless of the date of grant of the two-year renewal, the licensee will be required to comply fully with the minimum requirements set forth in paragraph (b) of this section at the end of the two-year renewal term.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-348

In the Matter of

Conflicts Between Applications
and Petitions for Rulemaking to
Amend the FM Table of Allotments

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 16, 1992; Released: August 4, 1992

By the Commission:

1. By this *Report and Order*, the Commission adopts new procedures for resolving conflicts between rulemaking petitions to amend the FM Table of Allotments and applications for new FM stations or for changes in facilities. Under our current procedures, pending FM applications are not protected from subsequently filed rulemaking petitions, resulting in delays in the processing of FM applications when conflicts arise. However, there are "cut-off" rules which protect rulemaking petitions from subsequently filed petitions and FM applications from subsequently filed applications. Since these cut-off rules in the petition and application contexts have proven effective in providing certainty to parties and avoiding unnecessary delays in processing, we are today adopting a new cut-off rule for resolving conflicts between rulemaking petitions and FM applications. In essence, FM applications will become protected from rulemaking petitions at the same time that they gain protection from other mutually exclusive applications – that is, FM applications for new stations or major changes filed during a filing window will be protected from rulemaking petitions at the close of the filing window.[1] All other FM applications will be protected as of the date they are received at the Commission. Conflicting rulemaking petitions filed before these cut-off dates will be considered mutually exclusive with FM applications, and the conflicts will be resolved under our existing policy for making substantive choices between conflicting proposals.

BACKGROUND

2. *Existing Policy.* As we explained in the *Notice of Proposed Rule Making* in this proceeding,[2] our existing procedure is that at any time during the pendency of an FM application, a rulemaking petition for a new FM allotment or an upgrade in the class of an existing FM allotment may be filed that conflicts with the transmitter site proposed in the FM application. Under these circumstances, we make substantive choices between the conflicting proposals based on several factors. First, we try to restrict the site of the proposed allotment or to use an alternative channel to eliminate the conflict. If this is not possible, we have generally given preference to the rulemaking petition over the application because we have presumed that granting a new FM allotment or an upgrade in the class of an existing allotment serves the public interest, while protecting an applicant's preference for a specific transmitter site specified in an application serves only an applicant's private interest.[3] Applicants have been permitted to rebut this presumption and demonstrate an overriding public interest justification for preferring the application site over the rulemaking petition[4] but have rarely prevailed.[5] As a result, to resolve the conflict, the FM applicant is typically required to amend its application to specify a nonconflicting site. In cases involving a number of mutually exclusive rulemaking proposals, this procedure may require an applicant to suspend prosecuting its application until the rulemaking proceeding is resolved, since the applicant cannot know until then whether the conflicting rulemaking proposal will be adopted.

3. *NPRM Proposal.* While this policy has resulted in more new FM allotments than would have otherwise been possible, the *Notice* recognized that it has imposed significant risks and uncertainty on applicants because, at any time during the pendency of an application, a conflicting rulemaking petition could be filed which would significantly delay further processing of the application. The *Notice* also stated that these risks persist late in the application process, after large amounts of funds may have been expended to prosecute the application. Since this uncertainty could substantially deter potential applicants from seeking to establish or improve service, the *Notice* proposed that FM applicants be cut-off from subsequently filed rulemaking petitions at some point in the application process. Specifically, the *Notice* proposed to use the deadline for filing Petitions to Deny against new and major change FM applications as the cut-off point for rulemaking petitions that conflict with those applications. This cut-off point was proffered because it occurs 30 days after new and major change applications have been placed on a publicly-released Notice of Acceptance. Likewise, the *Notice* proposed that minor change applications would be cut-off 30 days after acceptance of the application.[6] The

[1] Applications for new FM stations or major changes in the band reserved for noncommercial educational broadcasting, which are not subject to window filing procedures, will be protected at the end of the 30-day period for filing mutually exclusive applications as established in periodically released Commission Public Notices. *See* 47 C.F.R. § 73.3564(d) and § 73.3573(e).

[2] 6 FCC Rcd 7346 (1991).

[3] *See, e.g., Andalusia, Alabama* (Policy and Rules Div.), 49 FR 32201, published August 13, 1984. This policy has been in effect since the original FM Table of Allotments was in preparation. *See First Report and Order* in Docket No. 14185, 40 FCC 662, 703 (1962).

[4] This would entail showing what new areas would be covered by the applicant's proposed transmitter site and the extent to which these areas are currently unserved or underserved. *See Andalusia* at para. 8.

[5] One example of an applicant prevailing over a rulemaking petition occurred in *Las Vegas, Nevada* (Policy and Rules Div.), 51 FR 9433, published March 19, 1986.

[6] The *Notice* observed that minor change applications are generally granted within 120 days of filing.

Notice solicited comment on these proposed cut-off dates and questioned whether these time periods should be lengthened or shortened. Finally, the *NPRM* requested comment on whether the FM allotment priorities[7] should be used to determine if a rulemaking petition or an application receives cut-off protection -- that is, an application or a rulemaking petition would be preferred depending on whether it would further a higher allotment priority such as a first local service.

SUMMARY OF COMMENTS

4. *Overview.* All nine parties that filed comments or reply comments in this proceeding agree that FM applications should be given cut-off protection from subsequently filed rulemaking petitions at some time during the application process for essentially the same reasons set forth in the *Notice*.[8] They contend that the present procedures expose an applicant to considerable risks and delays after the filing of what was an acceptable application at the time it was submitted. They question whether this approach is in the public interest because applicants have often invested considerable amounts of money in seeking to improve service to the public. They also believe that since FM rulemaking petitions are similar in effect to the applications that follow, it is reasonable to resolve conflicts with the type of cut-off rules that have already proven effective in the application context.

5. *Earlier Cut-Off Date.* Of the nine commenting parties supporting a cut-off rule, five believe that a cut-off date earlier than the one proposed in the *Notice* should be adopted.[9] While there are some variations in their proposals, they essentially agree that applications should be cut-off from subsequently filed petitions for rule making on the date that the applications are filed.[10] Under this approach, if a rulemaking petition were filed after an FM application, it would have to protect the transmitter site specified in the application or be dismissed. Likewise, if a rulemaking petition were filed before a conflicting application, the application would have to protect the rulemaking petition or be dismissed. In support of this approach, commenters give three reasons. First, while they recognize that the *Notice's* proposal will eliminate many conflicts between applications and rulemaking petitions, they allege that it does not go far enough because it still invites the type of application/rulemaking conflicts that the Commission is now trying to avoid. This in turn still leads to uncertainty and delay for some FM applicants. Second, it is urged that an earlier cut-off date is needed to reduce the potential for abuse that exists because, prior to the cut-off dates proposed in the *Notice*, petitions for rulemaking can be filed by third parties to block attempts by applicants to upgrade their stations or to bring a new competitive service into a community. This potential for abuse could be substantially reduced if applications were cut-off on the date they were filed.[11] Third, they believe that this approach appropriately rewards a party who expeditiously files an application before a rulemaking proposal.[12]

6. *NPRM's Proposed Cut-Off Dates.* One commenter, TeleSouth Communications, Inc. ("TeleSouth") explicitly supports the cut-off rules proposed in the *Notice*. However, TeleSouth, as well as Mullaney Engineering, also urge the Commission to protect previously "cut-off" applications when resolving mutually exclusive rulemaking proceedings. For example, if two rulemaking proponents seek the allotment of the same channel to different, nearby communities, the Commission's staff may discover an alternative channel for one of the communities so that both rulemaking proposals can be granted. If such an alternative channel conflicts with an FM application that has already been "cut-off" from rulemaking petitions, TeleSouth and Mullaney believe that the Commission should be precluded from using that channel to resolve the rulemaking conflict, unless it can protect the application by site restricting the channel allotment.[13]

7. *Distinctions Based Upon FM Priorities.* Only two commenters, Pepper & Corazzini and KRTS/Texas Classical Radio, addressed the issue of whether the FM priorities should be used in determining if rulemaking petitions or applications are given cut-off protection. Both

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[7] These priorities are (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Equal weight is given to priorities (2) and (3). *See Second Report and Order* in BC Docket No. 80-130, 90 FCC 2d 88 (1982) (*Revision of FM Assignment Policies and Procedures).*

[8] A list of the parties filing comments and reply comments may be found in Appendix C.

[9] *See* comments filed by Pepper & Corazzini; KRTS, Inc. and Texas Classical Radio, Inc.; du Treil, Lundin & Rackley, Inc.; Haley, Bader & Potts; and Mullaney Engineering, Inc.

[10] Two variations of this approach were suggested regarding applications for new FM stations or major changes filed during a filing window. First, Pepper & Corazzini proposes that these applications be cut-off as of the opening of the filing window. Second, KRTS, Inc. and Mullaney Engineering propose that they be cut-off as of the end of the filing window because this is the same date that new and major change applications are cut-off vis-a-vis other applications.

[11] To further limit the possibility that "strike" rulemaking petitions may be filed to block FM applications, the joint comments of KRTS, Inc. and Texas Classical Radio request that the Commission also require disclosure by rulemaking petitioners of the identities and other media interests of their principals. They believe that such information would provide the Commission and interested parties with insight into the motives of a petitioner who files a conflicting proposal. We will not, however, consider this proposal as it is beyond the scope of the *Notice* in this proceeding.

[12] One commenter, du Treil, Lundin & Rackley, suggests that the Commission should protect FM rulemaking petitions on the date that they are filed from subsequently filed rulemaking petitions because this would further reduce delay and expense to rulemaking proponents. We will not, however, consider this proposal as it is beyond the scope of the *Notice* in this proceeding.

[13] TeleSouth also believes that the Commission should reinstitute its practice of issuing periodic public notices announcing the acceptance for filing of rulemaking petitions to amend the FM Table of Allotments because this would assist prospective applicants for new or modified FM facilities in the selection of transmitter sites. We do not believe that it is necessary to reinstitute this practice because this information is already available to the public. Specifically, after a rulemaking petition to amend the FM Table of Allotments has been accepted, we issue either a Notice of Proposed Rule Making or a Public Notice accepting the petition as a counterproposal in an existing allotment proceeding. In addition, prior to the release of these documents, the reference coordinates for acceptable rulemaking petitions are added to the Commission's FM Engineering Data Base which is also available to the public.

of these commenters agree with the Commission's tentative conclusion in the *Notice* that no distinctions between applications and rulemaking petitions should be made based upon the FM priorities because this would be too difficult to administer. They contend that this approach would require the Commission to conduct analyses under Section 307(b) of the Communications Act each time a party claims a higher allotment priority, which would create delays for applicants and an increased workload for the Commission.[14]

DISCUSSION

8. After careful consideration of the record in this proceeding and in light of our experience gained in administering the FM application process in recent years, we agree with the commenters that applicants for new or modified FM facilities should be protected from subsequently filed rulemaking petitions at some point during the application process because the current approach imposes significant and unwarranted risks and uncertainties on applicants. A rulemaking petition can be filed at any time during the pendency of an application, even after substantially large amounts of funds have been expended in order to prosecute an application. We believe that this unlimited exposure to potentially conflicting petitions and the concomitant delay it causes to applicants is both inequitable and inconsistent with our treatment of mutually exclusive proposals in both the allotment and application contexts. In FM allotment rulemaking proceedings, the Commission's Rules set forth deadlines for filing mutually exclusive counterproposals, and proposals that are not timely filed are not considered.[15] Likewise, mutually exclusive applications for new FM stations or major changes in the commercial FM band must be filed before a filing window closes and, for new or major change applications in the noncommercial FM band, before a cut-off date established in a public notice accepting the application. These cut-off procedures have worked effectively by providing some certainty to applicants in terms of their exposure to conflicting proposals, while at the same time allowing the Commission to consider competing proposals where they exist. We believe that a similar cut-off procedure could effectively lessen the uncertainty and delays experienced by FM applicants vis-a-vis conflicting rulemaking petitions.

9. Furthermore, the significant increase in the number of FM stations and the accompanying congestion in the FM band that has occurred since the formation of the FM Table of Allotments in 1964, coupled with land use and Federal Aviation Administration restrictions, has made it increasingly difficult for FM applicants to find new or improved transmitter sites. Given the time and effort required by FM applicants to secure new transmitter sites, we believe that FM applicants should be afforded some form of cut-off protection from subsequently filed rulemaking proposals.

10. After reexamining the cut-off rule proposed in our *Notice* and considering the commenters' proposals, we are of the view that FM applications should receive protection from conflicting rulemaking proposals at the same time that they receive such protection from other mutually exclusive applications. Under this approach, applications for new stations or for major changes in the nonreserved FM band[16] filed during a filing window will be protected from rulemaking petitions at the close of the filing window. Likewise, applications for new FM stations or major changes in the reserved, noncommercial band will be protected at the end of the 30-day period for filing mutually exclusive applications as established in periodically released Commission Public Notices. All other FM applications -- including all minor change applications in either the reserved or nonreserved band and "first come, first served" applications for new FM stations or major changes in the nonreserved band filed after the close of a filing window[17] -- will be protected from conflicting rulemaking proposals on the date they are received at the Commission.[18]

11. We believe that this approach strikes a reasonable balance between the public interest benefits arising from proposals to amend the FM Table of Allotments, thereby

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[14] In the only reply comment filed in this proceeding, the National Association of Broadcasters ("NAB") expressed support for the *Notice's* goal of providing greater certainty to applicants. However, noting that it would soon be filing a request for a comprehensive reassessment of the Commission's FM allotment and application processing policies, NAB urges that any final action in this proceeding be deferred until the agency has had the opportunity to complete such a review. We disagree. Although we recently solicited public comment on NAB's petition (RM-7933), we note that the issues raised in the petition are broad in scope and will require additional time to study. *See Public Notice*, Report No. 1882, March 20, 1992. Since the record in this proceeding indicates that FM applicants can benefit from some form of cut-off protection from subsequently filed rulemaking petitions, we do not believe that we should withhold the grant of such protection pending the outcome of a comprehensive review of FM allotment and application policies. Nothing we adopt today, by its nature, precludes a fair consideration of the alternatives which NAB has advanced.

[15] 47 C.F.R. 1.420(d).

[16] The nonreserved FM band refers to FM Channels 221-300, which are available for commercial use and are listed in the FM Table of Allotments. *See* 47 C.F.R. § 73.202(b). FM Channels 201-220 have been reserved for noncommercial FM broadcasting and are commonly referred to as the reserved band. *See* 47 C.F.R. § 73.501.

[17] We note that in a companion proceeding adopted today, we relaxed our "hard look" system for processing commercial FM applications to provide applicants with additional opportunities to amend their applications to correct deficiencies. *See Report and Order* in MM Docket No. 91-347, FCC 92-328, adopted July 16, 1992. The rule we adopt addresses the treatment of such amendments, as well as other amendments, with respect to earlier filed rulemaking proposals. Specifically, where an application is filed first, and subsequently a petition for rule making is filed that does not conflict with the application, it is conceivable that the application could be subsequently amended, either to correct a defect or for some other reason. If this amendment conflicts with the rulemaking petition, we do not intend to provide the amended application cut-off protection *nunc pro tunc* as of the date the unamended application would receive cut-off protection. Instead, the amended application will be treated as if filed on the date of the amendment for purposes of applying the cut-off rule.

[18] For purposes of this category, if a rulemaking petition is filed prior to or on the same date as a conflicting FM application, they will both be considered timely filed and treated under our existing substantive policy for resolving conflicts between applications and rulemaking petitions.

providing new or expanded FM service, and the benefits arising from providing applicants for new or modified FM facilities some degree of certainty that their applications are no longer subject to mutually exclusive proposals. Under this approach, prospective petitioners will have the same notice and opportunity to file conflicting proposals as is now afforded to prospective applicants whose applications might conflict with the pending application. We see no reason why this procedural window should not prove sufficient to protect the emergent plans of rulemaking petitioners as well. We note, moreover, that consistency between the potential exposure of an applicant to conflicting applications and conflicting rulemaking proposals will enhance the certainty and predictability of the application process.

12. The rule we are adopting differs somewhat from our original proposal to cut-off new and major change applications on the deadline for filing petitions to deny and to cut-off minor change applications 30 days after release of a notice of their acceptance, unless the minor change applications were granted earlier. After reviewing the comments, the majority of which favor the approach we now adopt, and our experience in processing applications and petitions, we conclude that our new rule strikes a more reasonable balance between the procedural rights and expectations of applicants and petitioners than our initial proposal because an FM applicant is "cut-off" from conflicting rulemaking proposals and other applications on the same date. In contrast, our original proposal would have established a cut-off date for filing rulemaking proposals at least 30 days after the date for filing competing applications, thereby unnecessarily exposing applicants to an additional period of uncertainty. Furthermore, the original proposal could have led to inequities to applicants. Applications filed on the same date could be accepted for filing on different dates depending upon the staff work involved in reviewing the "tenderability" and "acceptability" of the applications, thereby resulting in varying periods of vulnerability for similarly situated applications. To prevent any unfairness that this may cause, the rule we now adopt bases cut-off protection on the dates applications are filed, rather than processing dates.[19]

13. *Use of Alternative Channels.* Beyond protecting FM applicants from subsequently filed rulemaking petitions, both TeleSouth and Mullaney Engineering request that the Commission protect previously cut-off applications when it undertakes to resolve mutually exclusive rulemaking proceedings by using alternative channels. We agree with TeleSouth and Mullaney Engineering that it would be inequitable for the Commission to use generally alternative channels in a way that would prejudice the FM applicant who already has cut-off protection.[20] Such an approach would undermine the new rule's purpose of providing a degree of certainty to FM applicants.

14. However, we believe that there is one circumstance in which we do not wish to restrict our discretion to specify alternative channels. If one or more parties to the rulemaking proceeding suggest an alternative channel and reference coordinates in a pleading filed before the FM application is entitled to cut-off protection, we believe that the alternative channel may be considered. This would not create unfairness to the FM applicant because the proposal to use the alternative channel was on file before the application was entitled to cut-off protection. Also, we believe that this would give parties in a contested rulemaking proceeding an opportunity to submit settlement suggestions which would serve the public interest.

15. *Distinctions Based Upon FM Priorities.* We also conclude that, in determining whether an application or a rulemaking petition should receive cut-off protection, no distinctions should be made as to whether one serves a higher allotment priority than the other.[21] Such an approach would be difficult to administer because we would have to undertake detailed comparisons of the proposals before determining whether cut-off protection would be granted. Not only could this heavily burden our administrative resources but also it might obviate the purpose for having a cut-off rule because an applicant could not rely upon cut-off protection if a conflicting rulemaking petition were subsequently filed and triggered a higher allotment priority. Moreover, this approach would be inconsistent with our current allotment policy under which an untimely counterproposal in an allotment proceeding may not be considered even if it would trigger a higher allotment priority -- such as a first or second full-time reception service -- than the proposals that were timely filed.

16. *Effective Date.* The new cut-off rule we are adopting will become effective 30 days after publication in the Federal Register. All rulemaking petitions that are on file by that date will be handled under our existing procedures; rulemaking petitions filed after that date must comply with the new cut-off rule. As we stated in the *Notice*, we believe that this 30-day period before the rule becomes effective will provide adequate notice to potential petitioners for new allotments or upgrades while expediting the benefits to the public of the new cut-off procedure.

CONCLUSION

17. We believe that the current procedures governing conflicts between rulemaking petitions to amend the FM Table of Allotments and FM applications impose significant risks on applicants because pending applications are vulnerable to conflicting proposals at any time. The new cut-off rule we are adopting today will provide some certainty to applicants by limiting their exposure to conflicting rulemaking proposals while at the same time

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[19] As a related matter, we will retain cut-off protection for applications that have been dismissed or denied until the dismissal or denial is no longer subject to Commission review. While this issue was raised in the *Notice*, we note that none of the commenters addressed it.

[20] For example, suppose two mutually exclusive rulemaking proposals were filed, one on January 1, 1992, and one on February 1, 1992. Thereafter, an FM application is filed on June 1, 1992, which does not conflict with either rulemaking proposal. However, in September, 1992, the Commission's staff discovers that the mutually exclusive allotment proposals could both be accommodated by using an alternative channel which conflicts with the FM application. We believe that it would be inequitable in these circumstances to select the alternative channel since the FM application has already received cut-off protection.

[21] *See* note 7, *supra*.

affording prospective rulemaking petitioners the opportunity to seek new allotments or upgrades through the rulemaking process.[22]

18. Accordingly, IT IS ORDERED, that pursuant to authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 303, Part 73 of the Commission's Rules, 47 C.F.R. § 73.208(a) IS AMENDED as set forth in Appendix A, below.

19. IT IS FURTHER ORDERED, that the rule adopted herein will become effective 30 days after publication in the Federal Register.

20. Pursuant to the Regulatory Flexibility Act of 1980, the Final Regulatory Flexibility Analysis for this proceeding is attached as Appendix B.

21. IT IS FURTHER ORDERED, that MM Docket No. 91-348 IS TERMINATED.

22. For further information, contact Andrew J. Rhodes, Mass Media Bureau, (202) 632-5414.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Rule Changes

Part 73 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. Sections 154 and 303.

2. Section 73.208 is amended by revising paragraph (a)(1), adding new paragraphs (a)(3) and (b)(2), and redesignating existing paragraphs (b)(2)(b)(4) as paragraphs (b)(3)-(b)(5) to read as follows:

Section 73.208 Reference points and distance computations.

(a)(1) The following reference points must be used to determine distance separation requirements when petitions to amend the Table of Allotments (§ 73.202(b)) are considered:

(i) First, transmitter sites if authorized, or if proposed in applications with cut-off protection pursuant to paragraph (a)(3) of this section;

(ii) Second, reference coordinates designated by the FCC;

(iii) Third, coordinates listed in the United States Department of Interior publication entitled *Index to the National Atlas of the United States of America;* or

(iv) Last, coordinates of the main post office.

(The community's reference points for which the petition is submitted will normally be the coordinates listed in the above publication.

* * * * *

(3) Petitions to amend the Table of Allotments that do not meet minimum distance separation requirements to transmitter sites specified in pending applications will not be considered unless they are filed no later than:

(i) the last day of a filing window if the application is for a new FM facility or a major change in the non-reserved band and is filed during a filing window established under Section 73.3564(d)(3); or

(ii) the cut-off date established in a Commission Public Notice under Section 73.3564(d) and 73.3573(e) if the application is for a new FM facility or a major change in the reserved band; or

(iii) the date of receipt of all other types of FM applications.

If an application is amended so as to create a conflict with a petition for rule making filed prior to the date the amendment is filed, the amended application will be treated as if filed on the date of the amendment for purposes of this subsection (a)(3).

(b) * * *

(2) Reference coordinates designated by the FCC; or, if none are designated,

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APPENDIX B

Final Regulatory Flexibility Analysis

I. Need for and Purpose of this Action:

This action is taken to establish cut-off procedures governing conflicts between rulemaking petitions to amend the FM Table of Allotments and applications for new or changed FM facilities. The Commission believes that these new procedures will reduce the exposure that FM applicants currently have vis-a-vis conflicting rulemaking petitions and the concomitant delays in the processing of their applications.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

None.

[22] We are also taking this opportunity to make an amendment to Section 73.208(b) so that it contains the same types of geographic reference coordinates set forth in Section 73.208(a) consistent with the discussion in *Annette B. Godwin*, 7 FCC Rcd 3140 (Aud. Ser. Div. 1992). We find this rule change to be minor and non-controversial and a matter in which the public is unlikely to be interested. Accordingly, we find for good cause that notice and comment on this rule change is unnecessary. *See* 5 U.S.C. § 553(b)(B).

III. Significant Alternatives Considered and Rejected:

The Commission considered a proposal in the *Notice of Proposed Rule Making* to protect applications for new FM stations or for major changes after the deadline for filing petitions to deny and to protect minor change applications 30 days after release of a notice of acceptance, unless the minor change applications were granted earlier. This proposal was rejected because it did not strike as reasonable a balance between the procedural rights and expectations of applicants and petitioners as the rule that was adopted. Furthermore, the *Notice* 's proposal could have been inequitable to applicants since applications filed on the same date may be accepted for filing on different dates depending upon the staff work involved in reviewing the "tenderability" and "acceptability" of the applications.

APPENDIX C

List of Commenters

Initial Comments

1. Columbia FM, Inc.
2. du Treil, Lundin & Rackley, Inc.
3. Haley, Bader & Potts
4. Karl D. Lahm
5. KRTS, Inc. and Texas Classical Radio, Inc.
6. Mullaney Engineering, Inc.
7. Pepper & Corazzini
8. TeleSouth Communications, Inc.

Reply Comments

1. National Association of Broadcasters

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 91-2

In the Matter of

Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide for Interactive Video Data Services — RM-6196

MEMORANDUM OPINION AND ORDER

Adopted: July 16, 1992; Released: August 4, 1992

By the Commission:

I. INTRODUCTION

1. On January 16, 1992, we adopted a *Report and Order* (*Report*) in this proceeding[1] that, *inter alia*, established a frequency allocation and service rules for the Interactive Video and Data Service (IVDS). The purpose of this *Report* was to make available an allocation of radio spectrum that licensees could use to provide a variety of radio-based interactive services to the public. Six petitions requesting that we reconsider various aspects of our *Report* have been filed.[2] This *Memorandum Opinion and Order* (*Order*) grants, in part, those requests, and makes several minor non-substantive changes to the IVDS rules.

II. PLEADINGS

2. A number of petitioners seek reconsideration of the types of systems that are permitted to interact with IVDS. Wireless seeks reconsideration of Section 95.805(d) of the rules, 47 C.F.R. § 95.805(d).[3] Wireless states that because we have previously determined that wireless cable (often referred to as the Multichannel Multipoint Distribution Service or MMDS) and Direct Broadcast Satellite (DBS) systems are neither broadcast or cable systems, subscribers to these video transmission mediums are thus precluded from using IVDS.[4] Coastal Wireless Cable Partners and Potomac Wireless Cable Partners, Southwestern Bell Telephone Company, and TV Answer support the petition. RTT argues that the rule, as written, does not preclude use of an IVDS system with MMDS or DBS systems.[5]

3. TV Answer seeks reconsideration of the antenna height limitation and the residential dwelling minimum separation distance requirement in Section 95.859 of the Commission's Rules, 47 C.F.R. § 95.859.[6] In regard to the antenna height limitation, TV Answer states that in densely populated urban areas and in areas with mountainous terrain or other obstructions, it will be necessary for cell transmitter station (CTS) antennas to be located on building rooftops or other structures that will exceed the height limitation in Section 95.859 in order to provide adequate coverage.[7] It recommends IVDS licensees be permitted to exceed the height limitation when there is a corresponding reduction in effective radiated power (ERP) so that equivalent interference protection is maintained. RTT agrees that higher antenna heights should be permitted but without the corresponding reduction in power.[8] Telecommunications Site Acquisition, Inc. (Telsa) argues that removing the limitation will allow IVDS licensees to place CTSs on rooftops of buildings and existing radio towers which will in turn save licensees untold amounts of time and expense.[9] Concepts-To-Operations (Concepts) agrees with TV Answer in principal, but states that the formula suggested may not be the most appropriate.[10]

4. The 200 foot minimum separation distance from residential dwellings requirement for CTS antennas, TV Answer contends, will severely limit the ability of IVDS licensees to serve densely populated areas.[11] It suggests that the Commission take an approach similar to that recommended for allowing higher antenna heights in other services and permit CTSs to be located closer than 200 feet when there is a corresponding reduction in power. RTT also agrees that the 200 foot separation requirement may be a problem in densely populated urban areas.[12]

5. The Association for Maximum Service Television, Inc. (MSTV), supported by the National Association of Broadcasters (NAB), opposes TV Answer's request to exceed the height limitation and the residential dwelling distance separation requirement. MSTV and NAB argue that allowing a higher CTS antenna, even with a corresponding reduction in power, will increase the likelihood for interference within a TV Channel 13 station's Grade B contour and that the residential dwelling separation requirement is solidly grounded in TV Answer's own data and interference tests the Commission conducted.[13]

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[1] *See* 7 FCC Rcd 1630 (1992).

[2] The petitioners are TV Answer, Inc. (TV Answer), Radio Telecom and Technology, Inc. (RTT), Wireless Cable Association International, Inc. (Wireless), Fisher, Wayland, Cooper, and Leader (Fisher), Richard L. Vega (Vega), and Leonard Yaeger and Frank Kimball (Yaeger).

[3] This section states "The licensee may use the IVDS system to interact with its subscribers.... in conjunction with broadcast and cable operations."

[4] Wireless petition at 2.

[5] Comments of RTT at 2.

[6] Section 95.859(a) states "No CTS antenna shall be elevated higher than necessary to assure adequate service. No CTS antenna structure, including the radiating elements, tower, supports and all appurtenances, may exceed a maximum Height Above Average Terrain (HAAT), as defined in Section 90.309 of the Commission's Rules, of 36.6 m (120 feet) within an area defined by a boundary line 16 km (10 miles) outside of the Grade B contour of a TV Channel 13 station. When an antenna is located beyond 10 miles from a TV Channel 13 Grade B contour, the HAAT shall not exceed 152.5 m (500 feet)." Section 95.859(b) states "No CTS antenna shall be located within 61 m (200) feet of a residential dwelling."

[7] TV Answer petition at 5.

[8] Comments of RTT at 1.

[9] Telsa comments at 1-2.

[10] Comments of Concepts at 2.

[11] TV Answer petition at 8-9.

[12] RTT comments at 2.

[13] *See* MSTV and NAB Comments and Partial Opposition to

6. RTT seeks reconsideration of three IVDS rules.[14] Specifically, it requests that we delete the requirement that the response transmitter unit (RTU) antenna be an integral part of the RTU,[15] that we increase the minimum system construction requirements from a 39 dBu contour over at least 50 percent of households or other service locations within the service area to 80-90 percent or more of the locations,[16] and that we remove the requirement for the IVDS system licensee to inform potentially (affected households of the possibility for interference from the IVDS system when the local TV Channel 13 licensee agrees that such notification is unnecessary.[17] USIS Technology and Management, Inc., United States Independent Microwave Television Association, Spectrum Engineering and Technology, Inc., NTN Communications, Inc., Smart TV, Inc., Bonneville International Corporation, and Stardancer Communications support RTT's petition.

7. Fisher requests reconsideration of our decision to require applicants for an IVDS system license to submit only a completed FCC Form 155 and the appropriate fee to enter the lottery.[18] It states this procedure will not discourage the filing of speculative applications because the FCC Form 155 can be quickly and easily filled out.[19] To discourage the filing of speculative applications, Fisher suggests we make the application procedure more burdensome by requiring each applicant to submit a certification with its FCC Form 155 verifying that it has already completed a Form 574 for the proposed system.[20] Fisher also asks that we clarify the meaning of the term "interest" for purposes of determining whether an applicant has an interest in another pending application.[21] TV Answer supports Fisher's request for this clarification.[22] Finally, Fisher inquires about the fee that will apply to IVDS applications specifying fewer than 40 CTSs.[23]

8. Yaeger and Vega seek reconsideration of the $1,400 license application fee adopted in the *Report*. Yaeger states this application fee is prohibitively high for small entrepreneurs.[24] He believes that we should require a showing of technical capability, such as a service area agreement with TV Answer, and that the application fee should not exceed $100 per market area.[25] Vega contends that we do not have statutory authority for the filing procedure adopted because the total amount of filing fees collected from applicants for a given market will grossly exceed the cost of processing the application from the winners in that market.[26] Concepts supports the Vega petition. TV Answer, in its comments, agrees that the $1400 application fee is excessive and supports reducing the fee.[27]

III. DISCUSSION

9. *Permissible communications.* One of our goals in establishing IVDS was to allow system licensees the opportunity to provide their subscribers a wide array of interactive services. As we stated in the *Report*, IVDS licensees may provide "two-way interaction with commercial and educational programming, along with informational and data services that may be delivered by and coordinated with, broadcast television, cable television, wireless cable, direct broadcast satellite, or any future television delivery method."[28] Thus, it was clearly our intent to allow interaction with all video delivery systems, including wireless cable and direct broadcast satellite. To eliminate any ambiguity in the rules, however, we are revising Section 95.805(d) by substituting the phrase "video and data delivery systems" for broadcast and cable operations.

10. *Antenna height.* In the *Report* we adopted a CTS maximum antenna height of 120 feet or 500 feet depending on the CTS location relative to a TV Channel 13 Grade B contour, extended 16 km. We also said we would consider waivers of the HAAT limits on a case-by-case basis. TV Answer's request would allow CTS antennas to be located on high structures within a service area on a routine basis provided there is a corresponding reduction in power. We have taken this approach in other radio services to allow licensees additional design flexibility and to reduce the Commission's waiver workload. This approach has worked well.[29] Based upon this favorable experience, we are revising Section 95.859(a) to allow higher CTS antennas when there is a corresponding reduction in power. We will use TV Answer's formula to determine the maximum power.[30] We remind IVDS licensees, however, that they still are responsible for investigating and eliminating interference caused by any CTS or RTU within 30 days of written notification, regardless of the antenna height, or the CTS or RTU must discontinue operation. This requirement maintains the same degree of protection from interference that TV Channel 13 stations received in the *Report*, and therefore, NAB and MSTV will not be adversely impacted by this revision.

11. *Minimum separation distance.* We adopted a 200 foot minimum separation distance between a CTS antenna and adjacent residences to protect nearby television receivers from interference. This distance was based on the CTS transmission rates and power levels in the TV Answer system.[31] TV Answer and RTT have persuaded us, however, that this requirement may be overly restrictive. For example, residences within 200 feet that are using cable may not be subject to the same interference potential as residences receiving an over-the-air television signal. Fur-

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Petitions for Reconsideration at 2, 5. Concepts-to-Operations, Inc., states the free space propagation model used by TV Answer may understate the amount of interference to nearby residences. Comments of Concepts at 2-3.

[14] RTT petition at 4-5.

[15] *See* 47 C.F.R. § 95.859(c).

[16] *See* 47 C.F.R. § 95.833(a).

[17] *See* 47 C.F.R. § 95.861(c).

[18] Fisher petition at 2.

[19] *Id.*

[20] *Id.*

[21] *Id.* and *Report*, para. 70.

[22] TV Answer opposition at 7-8.

[23] Fisher petition at 4.

[24] Yeager petition at 1. Yeager claims the application fee for ten markets is about four times the amount he and his partner paid TV Answer for the actual technology licenses in those markets.

[25] *Id.*

[26] Vega petition at 1-2.

[27] TV Answer opposition at 5-6.

[28] *See Report*, para. 1.

[29] For example, *see* Sections 90.619 and 90.635.

[30] For convenience, we will use a Table in the rules rather than a formula.

[31] *See Report* at para. 34.

ther, as noted in paragraph 10, we have had success with the concept of equivalent protection. Therefore, we will revise Section 95.859(b) to permit IVDS system licensees to locate a CTS antenna within 200 feet of a residential dwelling when there is a corresponding reduction in power or the licensee can obtain the written agreement of the residences within that distance. Again, because the interference rules are unchanged, NAB and MSTV will not be adversely impacted by our decision.

12. *RTU antennas.* In the *Report,* we adopted a requirement for RTUs to have an integral antenna because we believed the potential for increased interference associated with allowing an external antenna outweighed the added flexibility. The commenters argue that an external antenna can often reduce the interference potential. For example, the CTS transmitter power could be reduced if outside antennas were allowed. Further, allowing the subscriber to place the RTU antenna strategically could result in the RTU transmitting at a lower power than would be needed with an integral antenna. Based on this information we are deleting the requirement that the RTU antenna be an integral part of the unit. A subscriber may use an external antenna provided the antenna is not more than 6.1 m (20 feet) above ground or above an existing man-made structure. Again, as we noted earlier, the IVDS licensee must resolve any interference caused by a RTU in its system regardless of the type of antenna. To minimize the potential of consumers making an incorrect antenna connection, we will require RTUs that are capable of using an external antenna to use a unique antenna jack or electrical connector.[32]

13. *Construction requirements.* Many of the potential users of this service expressed concern that licensees selected through the lottery process would be speculators who would not actually build the system. To address this concern, we adopted rules requiring licensees to meet certain construction benchmarks and prohibiting transfer of the license until the system has been built. These rules are intended to ensure that the system is actually built, to eliminate the possibility of warehousing frequencies, and to reduce the attractiveness of licenses to entities interested in them only as a speculative vehicle.[33] We believe that our definition of when a system is built strikes a reasonable balance between the competing goals of preventing speculation and not imposing a construction requirement so severe that it stifles the introduction of new technology or discourages qualified entities from applying for a license. The request of RTT that we increase the five-year construction requirement to 80 to 90 percent of households or other service locations does not satisfy this balance and may deter the introduction of new technology or discourage qualified applicants from applying. RTT's request, therefore, is denied.

14. *Interference potential notification.* We stated in the *Report* that the interference elimination plan we adopted strikes a reasonable balance between our strong desire to protect television reception from potential interference from the operation of IVDS systems and our interest in not placing an undue burden on IVDS licensees. RTT has satisfied us, however, that because a broadcast licensee also has a great interest in averting any interference to the reception of its transmissions, an IVDS system licensee should be allowed the option of dispensing with notification to each household when the TV Channel 13 station licensee agrees. Furthermore, this option provides the IVDS system licensee with a strong incentive to employ equipment for which the TV Channel 13 station licensee will attest as to its interference-free operation. Accordingly, RTT's request to eliminate the viewer notification requirement subject to the agreement of the TV Channel 13 station licensee is granted.

15. *Licensing procedure.* The licensing procedure adopted was based on our desire to minimize the filing burden on the both the applicant and the Commission, and to provide for the early introduction of IVDS to the public.[34] To accomplish this, we decided to use an abbreviated filing procedure that requires an applicant for an IVDS system license to submit initially only a FCC Form 155 and the appropriate filing fee. Vega's claim that we do not have statutory authority for charging the $1,400 filing fee is based on the assumption that no application is being filed to enter the lottery. This assumption is incorrect. In the *Report,* we said we would use the Form 155 as the initial application, regardless of the number of CTSs the applicant proposes to construct.[35] The fee for this application is consistent with the statute and our fee schedule.[36] Further, we used a similar approach to determine the filing fee in other private radio services where the applicant files a Form 155.[37] Finally, the basis for the $1,400 fee was discussed in the *Report.* There we pointed out the problems associated with having different filing fees for different markets and with applicants submitting low estimates for the number of CTSs required. We also noted that this licensing approach is consistent with our goals of reducing licensing burdens, increasing flexibility, and providing early introduction of IVDS.[38] Vega and Yaeger raised no new issues of fact or arguments of law that require a different conclusion on this issue. For these reasons, their proposals are denied.

16. Fisher's suggestion that we require each applicant to submit a certification with the FCC Form 155 serves no purpose other than to increase the cost of applying for an IVDS license and to make work for license application preparers. We believe the requirement that applicants file a Form 574 and the required plans within two days of notification of selection as one of the tentative licensees is sufficient to safeguard against speculation by entities that have no intention of building a system. Fisher also inquired about IVDS applicants that submitted applications for less than 40 CTSs. In the *Report,* we stated that we would blanket license an IVDS system for 40 CTSs.[39] Therefore, licensees may construct up to 40 CTSs without modifying their licenses or paying additional application

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[32] For example, RTUs could not employ an "F-type" fitting or "BNC" connector.
[33] *See Report* at para. 77-79.
[34] *See Report* at para. 69-72.
[35] *See Report* at para. 70.
[36] *See* 47 U.S.C. 158 and 47 C.F.R. § 1.1102.
[37] *See Report and Order,* 6 FCC Rcd 2356 (1991).
[38] *See Report* at para. 71.
[39] *See Report* at para. 71.

or filing fees.[40] We will hold no lotteries on a Thursday or Friday so that 48 hours will be available from any lottery to the filing deadline.

17. *Clarification.* Fisher and TV Answer asked that we clarify the meaning of the term "interest" as it applies to our policy that applicants cannot have any interest in more than one application for the same service area.[41] The intent of this policy is to prohibit an applicant from increasing his or her "probability of being selected in the lottery process by individually filing or being a partner in multiple Form 155 applications in a single service area. Further, this policy is consistent with our rule that prohibits an entity from having an interest in both IVDS licenses in the same service area.[42] We consider an entity to have an interest in an IVDS application or license if it has any ownership interest (including stock ownership), direct or indirect financial interest, or can exercise actual or *de facto* management control. We do not consider an entity that receives only royalty payments or a license fee for the use of its technology as having an interest in an application or license.

IV. CONCLUSION

18. In summary, we have revised the rules for IVDS to clarify that this service may be used in conjunction with all forms of video and data delivery systems and to provide greater flexibility to system licensees in designing their systems. We have also made several minor non-substantive editorial amendments.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

19. Pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), *see* 5 U.S.C. § 604, our final analysis is as follows:

a. *Need for, and Objectives of, Rules.* Our objective is to establish a consumer oriented interactive video and data service. The rules adopted herein will allow flexibility in implementing this new service, while reducing the potential for this service to interfere with existing services.

b. *Issues Raised by the Public in Response to the Initial Analysis.* The commenters generally agree that revisions to some of the rules for this service are needed. These revisions may eliminate unnecessary and costly administrative burdens on small entities. We note that any impact of this action on entities, some of whom may be small entities, will be to reduce the cost of doing business.

c. *Any Significant Alternatives Considered and Rejected.* The Commission did not reject any alternative designed to minimize the economic impact of the amended rules on small entities.

VI. ORDERING CLAUSES

20. In view of the foregoing and pursuant to the authority contained in Sections 4(i), 303(r) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 405, and Section 1.429(i) of the Commission's Rules, 47 C.F.R. § 1.429(i), IT IS ORDERED THAT the Petitions for Reconsideration filed by TV Answer, Inc., Radio Telecom and Technology, Inc., Wireless Cable Association International, Inc., Fisher, Wayland, Cooper, and Leader, Richard L. Vega, and Leonard Yaeger and Frank Kimball ARE GRANTED as indicated herein and ARE DENIED in all other respects.

21. IT IS FURTHER ORDERED THAT pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 95 of the Commission's Rules IS AMENDED as set forth below effective [30 days after publication in the Federal Register].

22. IT IS FURTHER ORDERED THAT a copy of this Order will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

23. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

24. For further information concerning this Order, contact Mr. William T. Cross, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554, at (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FINAL RULES

Part 95 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 95 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 95.805 is amended by revising paragraph (d) to read as follows:

§ 95.805 Permissible Communications.

* * * * *

(d) The licensee may use the IVDS system to interact with its subscribers concerning products and services offered, polls conducted, educational classes taught, and other activities in conjunction with video and data delivery systems.

[40] A licensee whose system uses less than 40 CTSs, however, must still meet the construction benchmarks in Section 95.833.
[41] For purposes of the lottery, an application is a FCC Form 155. *See Report* at para. 70.
[42] *See* 47 C.F.R. §95.813(b).

* * * * *

3. Section 95.811 is amended by revising paragraph (b) to read as follows:

§ 95.811(b) License requirements.

* * * * *

(b) Each CTS where the antenna does not exceed 6.1 meters (m) (20 feet) above ground or an existing man-made structure (other than an antenna structure) is authorized under the IVDS system license. All other CTSs must be individually licensed to the system licensee.

* * * * *

4. Section 95.815 is amended by revising paragraph (b) to read as follows:

§ 95.815 License application.

* * * * *

(b) Each application for an IVDS system license and each application for a CTS license where the CTS antenna exceeds 6.1 m (20 feet) (*See* § 95.811(b)) must be made on a separate FCC Form 574. Each application for an IVDS system license must be submitted to the Federal Communications Commission, Interactive Video and Data Service, P.O. Box 358365, Pittsburgh, PA 15251-5365. Each application for the CTS must be submitted to the address set forth in § 1.1102 of the Commission's Rules.

* * * * *

5. Section 95.859 is amended by removing paragraph (d) and revising paragraphs (a), (b), and (c) to read as follows:

§ 95.859 Antennas.

(a) The CTS antenna includes the radiating element(s), tower, supports and all appurtenances. No CTS antenna shall be elevated higher than necessary to assure adequate service.

(1) A CTS antenna located within a boundary line 16 km (10 miles) outside the Grade B contour of a TV Channel 13 station may not exceed a maximum Height Above Average Terrain (HAAT), as defined in § 90.309, and maximum ERP as set forth below:

HAAT (m)	(feet)	Maximum ERP (watts)
0-36.6	0-120	20.0
36.6-73.2	121-240	5.0
73.3-152.4	241-500	1.2
152.5-304.8	501-1000	0.29
304.9-609.6	1001-2000	0.073

(2) A CTS antenna located beyond a boundary line 16 km (10 miles) outside the Grade B contour of a TV Channel 13 station may not exceed a maximum HAAT, as defined in § 90.309, and maximum ERP as set forth below:

HAAT (m)	(feet)	Maximum ERP (watts)
0-152.4	0-500	20.0
152.5-304.8	501-1000	5.0
304.9-609.6	1001-2000	1.2

(b) No CTS antenna shall be located within 61 m (200 feet) of a residential dwelling unless the IVDS system licensee has reduced power such that the field strength of the CTS antenna at the residential dwelling does not increase relative to the field strength of the CTS antenna at 61 m or obtained the written concurrence of the resident(s) within 61 m of the CTS antenna. The written concurrence must be kept as part of the IVDS system authorization.

(c) The RTU may be connected to an external antenna not more than 6.1 m (20 feet) above ground or above an existing man-made structure (other than an antenna structure). Connectors that are used to connect RTUs to an external antenna shall not be of the types generally known as "F-type" or "BNC type." Use of an external antenna is subject to § 95.861.

6. Section 95.861 is amended by revising paragraph (c) to read as follows:

§ 95.861 Interference

* * * * *

(c) Unless the IVDS system licensee obtains written consent from the TV Channel 13 station licensee to dispense with this notification, each IVDS system licensee must notify all households located both within a TV Channel 13 station Grade B predicted contour and the IVDS system service area of the potential for interference from an IVDS system. The IVDS system licensee must also inform those potentially affected households that it will eliminate any objectionable interference to television reception caused by its IVDS system. This notification shall be made no earlier than two weeks before and no later than two weeks after initiation of IVDS in the TV Channel 13 station Grade B predicted contour. The written consent must be kept as part of the IVDS system authorization.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-170

In re Applications of

LIBERTY UNIVERSITY, INC.
(hereafter "Liberty")
Channel 210A (89.9 MHz)
Lynchburg, Virginia — File No. BPED-911206MB

VISION COMMUNICATIONS, INC.
(hereafter "Vision")
WRXT (FM)
Channel 212C2 (90.3 MHz)
Roanoke, Virginia — File No. BMPED-920414IF

For Construction Permits for New and Modified Noncommercial FM Facilities

HEARING DESIGNATION ORDER

Adopted: July 28, 1992; Released: August 3, 1992

By the Chief, Audio Services Division:

1. The Commission has under consideration the above-captioned mutually exclusive applications for a new, noncommercial, educational FM station.[1]

2. *Preliminary Matter.* Liberty proposes to construct a new, noncommercial educational FM station to serve Lynchburg, Virginia on Channel 210A (89.9 MHz); Vision proposes to modify its existing construction permit (BPH-880801ME) by changing its transmitting antenna location and height and by adding a directional antenna to its facility serving Roanoke on Channel 212C2 (90.3 MHz).[2] Section 73.509 of the Commission's rules states, in pertinent part, that applications for new or modified noncommercial FM facilities will not be accepted if the proposed operations of adjacent-channel facilities involve overlap of the interfering (80 dBU) and protected (60 dBU) signal strength contours of the respective stations. According to our engineering analysis, it is clear that the proposals are involved in overlap situations. Therefore, the applications are mutually exclusive and must be consolidated for hearing. *Ashbacker Radio Co. v. FCC*, 326 US 327 (1948).

3. *Liberty.* Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Liberty would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

4. Section II, Item 4 of FCC Form 340 (May, 1985) requires applicants to specify the residential address for each member of its governing board. Liberty has not completed this item correctly, providing a post office box number for three and apparent business addresses for twelve of its trustees.[3] Accordingly, Liberty must submit an amendment giving all the information required by this item to the presiding Administrative Law Judge within thirty days of the release of this Order.

5. *Vision.* Vision proposes to construct a new tower on Taylors Mountain in Roanoke County, Virginia. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Vision may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Vision's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Specifically, Vision must amend its showing to address the issue of potential occupational hazards caused by the proposed facility. This amendment should explain what steps will be taken to limit the RF radiation exposure to persons authorized access to the tower.[4] Accordingly, Vision will

[1] Vision's application proposes to change its area served by approximately 41%, and is therefore treated as a minor application pursuant to Section 73.3573(a)(1).

[2] Vision's construction permit (BPED-880801ME) was granted October 4, 1991. Since its instant application was filed within nine months of this date, Vision is required by Section 73.3535(a) of the Commission's rules to provide a statement that it will "immediately begin building after the modification is granted." *See Memorandum Opinion and Order*, 102 FCC 2d 1054 (1985). Vision will be required, therefore, to amend its application to provide this certification.

[3] Exhibit 2 to Liberty's application includes the Liberty University Board of Trustees. The list provides only post office boxes for Trustees Pate, Dobson and Gage. In addition, the addresses listed for trustees Crain, Dinsbier, Fitzpatrick, Graham, Merritt, Rhodenhizer, Smith, Sweet, Thompson, Thorpe, Vines and Lovett are those of the various churches each serves. It is not clear from this exhibit whether these addresses are meant to connote residence as well.

[4] Vision's engineering report states that workers will be instructed to limit their exposure to RF fields to six minutes "when visits to the site by authorized personnel require exposure to RF fields in excess of 1.0 mV/cM squared." OST Bulletin 65 states, however, that exposure must be *time-averaged*

be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the environmental assessments, that Vision's proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue will be deleted and the presiding judge shall therefore not consider the environmental effects of the proposal. *See* 47 C.F.R. § 1.1308(d).

6. *Other matters.* The applicants have not indicated whether an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement among themselves.

7. The respective applications are for different communities, but do not propose to serve substantial areas in common. Therefore, it will be necessary only to determine pursuant to Section 307(b), which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

8. Inasmuch as it appears that there would be a significant difference in the size of the populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

9. Except as indicated above, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Liberty would constitute a hazard to air navigation.

2. If a final environmental impact statement is issued with respect to Vision in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine, where appropriate: (a) the number of other reserved channel noncommercial, educational FM services available in the proposed service area of each applicant, and the area and populations served thereby; (b) whether a share-time arrangement between the applicants would result in the most efficient use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if either.

11. IT IS FURTHER ORDERED, That Vision shall submit the certification noted in footnote 2 of this Order to the presiding Administrative Law Judge within thirty days of the release of this Order.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That Liberty shall submit the appropriate amendment containing all information required by Section II, Item 4 of FCC Form 340 to the presiding Administrative Law Judge within 30 days of the release of this order.

14. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Vision shall submit the environmental assessment required by § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief,

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over a six minute period. This means, for example, that if a worker is exposed to twice the ANSI levels for three consecutive minutes, he or she must not be exposed at all during the subsequent three minute period. Given this fact, Vision will be required to amend its application to include a further explanation on this matter.

Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Complainant,

v.

CENTRAL TELEPHONE COMPANY - IOWA,	File No. E-92-07
CENTRAL TELEPHONE COMPANY - MINNESOTA,	File No. E-92-08
CENTRAL TELEPHONE COMPANY - NEVADA,	File No. E-92-09
CENTRAL TELEPHONE COMPANY - NORTH CAROLINA,	File No. E-92-10
CENTRAL TELEPHONE COMPANY OF TEXAS,	File No. E-92-11
TELEPHONE UTILITIES EXCHANGE CARRIER ASSOCIATION, *et al.*,	File No. E-92-12
CAROLINA TELEPHONE AND TELEGRAPH COMPANY,	File No. E-92-13
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-92-14
EAST ASCENSION TELEPHONE COMPANY,	File No. E-92-16
UNITED TELEPHONE COMPANY OF THE NORTHWEST,	File No. E-92-17
UNITED TELEPHONE COMPANY OF OHIO,	File No. E-92-18
UNITED TELEPHONE COMPANY OF ARKANSAS, UNITED TELEPHONE COMPANY OF IOWA, UNITED TELEPHONE COMPANY OF KANSAS, INC., UNITED TELEPHONE COMPANY OF MINNESOTA, UNITED TELEPHONE COMPANY OF MISSOURI, UNITED TELEPHONE COMPANY OF TEXAS, INC., UNITED TELEPHONE COMPANY OF THE WEST, and	File No. E-92-19
UNITED TELEPHONE COMPANY OF PENNSYLVANIA, Defendants.	File No. E-92-20

ORDER

Adopted: July 27, 1992; Released: August 4, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent complainant, American Telephone and Telegraph Company (AT&T), may be entitled to recover damages as a result of defendants'[1] alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990.

II. BACKGROUND

2. The case that AT&T presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and

[1] Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company, and Pacific Northwest Bell Telephone Company have consolidated. U S West Communications, Inc. (USWC) is the remaining company. *See* 5 FCC Rcd 1982 (1990).

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[4] The complainants relied, as does AT&T in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules for the relevant monitoring period. *See* 47 C.F.R. § 65.600.

were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability in their pleadings filed in the captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

III. CONTENTIONS OF THE PARTIES

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. AT&T's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1989 through December 31, 1990, and the amount it would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8]

5. Defendants raise a number of challenges to complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[9] Defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[10] and, therefore, unlawful. Some defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings against underearnings.[11] The majority of defendants contend that an award of damages based on the measure advocated by complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.[12] In addition, some defendants argue that even assuming that violations of the Act and actual damages in consequence thereof can be established, it would be inequitable to award damages to AT&T since AT&T would not flow through such damages to its own customers.[13]

6. AT&T has propounded interrogatories to each defendant. Defendants have answered some of the interrogatory requests and have objected to others. East Ascension Telephone Company (EATEL) has also served interrogatories

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[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[6] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[8] AT&T also seeks interest on this amount. We note that some defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] The issues and arguments raised by defendants in response to AT&T's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[10] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[11] *See, e.g.*, Answer of Defendant Central Telephone Company - Iowa at 5.

[12] *See, e.g.*, Answer of Defendant Central Telephone Company--Iowa at 5.

[13] *See, e.g.*, USWC Answer at 8. We do not reach that issue in this interlocutory ruling. We are concerned here only with establishing a schedule for further discovery and briefing.

on AT&T. Both AT&T's and EATEL's interrogatories are currently the subject of motions to compel and related pleadings.[14]

IV. DISCUSSION

A. Measure of Damages

7. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which AT&T may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with AT&T, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainant in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by defendants that would tend to show that AT&T's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding AT&T's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute AT&T's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

8. We will require defendants to make available to complainant information necessary to compute the difference between the amount complainant actually paid for defendants' access services during the relevant monitoring period and the amount complainant would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 7 herein.

B. Motions to Compel

1. AT&T's Interrogatories

Interrogatories 1, 2, and 3

9. In Interrogatories 1 and 2, AT&T requests that defendants state the amount of total revenues on line 1 of their Forms 492 that is the result of billing to interexchange carriers for interstate access services and the amount paid by AT&T that is reported in total revenues on line 1 for the relevant monitoring period. Interrogatory 3 requests information regarding various taxes levied upon defendants during the relevant monitoring period.

10. United and Carolina Telephone have filed motions for extension of time in order to answer AT&T's Interrogatories 1, 2 and 3. They have requested an extension of time until 15 days after a finding of liability has been made in these proceedings based on the contention that discovery prior to such a finding is premature. EATEL objects to Interrogatory 1 on the grounds that it is ambiguous. With regard to Interrogatories 2 and 3, EATEL objects that the requests are burdensome, expensive to answer, and that AT&T has such information in its possession or the information is in the public record. In response, AT&T clarified its request in Interrogatory 1. AT&T contends that EATEL has failed to establish that providing the information requested in Interrogatories 2 and 3 would be excessively burdensome.

11. The argument that discovery regarding damages is premature is unavailing since we have decided not to adopt a bifurcated approach in these proceedings. Rather, as stated above, we have concluded that the parties' and the Commission's interests in obtaining the earliest practicable resolution of this matter will be better served by requiring the parties to develop a full record on the issues of liability and damages at this time. Additionally, we find that AT&T's information requests are reasonable and do not impose an undue burden on defendants. Accordingly, we will require defendants to answer Interrogatories 1, 2, and 3.

Interrogatory 4

12. AT&T seeks information regarding revenue accruals earned but not yet billed that were reported as part of total revenues on line 1 of defendants' Forms 492 for interstate access and each access service category. EATEL objects on the grounds that this interrogatory is not relevant with regard to individual service categories as the complaint raises no issues regarding these service categories. Carolina Telephone and United object on the grounds that the interrogatory is overbroad, irrelevant, and seeks proprietary information. However, after AT&T clarified the meaning of "accrual" in its motion to compel, Carolina Telephone and United state that no accruals exist on their books.

13. We will require EATEL to clearly state whether it has not yet billed AT&T for relevant interstate access services rendered to AT&T during the 1989-1990 monitor-

[14] AT&T has filed motions to compel against Carolina Telephone and Telegraph Company (Carolina Telephone), EATEL, United Telephone Company of the Northwest, United Telephone Company of Ohio, United Telephone Company of Arkansas, United Telephone Company of Iowa, United Telephone Company of Kansas, Inc., United Telephone Company of Minnesota, United Telephone Company of Missouri, United Telephone Company of Texas, Inc., United Telephone Company of the West, and United Telephone Company of Pennsylvania (collectively "United").

ing period and, if so, state the amount yet to be billed for such services. EATEL need not produce such information as it pertains to its non-AT&T customers.

2. EATEL's

Interrogatories

Interrogatory 1

14. Interrogatory 1 requests that AT&T state, among other things, the time it has spent to ascertain that EATEL's rates for the subject monitoring period were unjust and unreasonable under Section 201(b) of the Communications Act. While AT&T provided the majority of the requested information, it did not provide the exact amount of time devoted to this activity. EATEL contends that the exact amount of time is relevant to its claim that AT&T spent no time in preparing the "cookie cutter" complaint against EATEL. AT&T responds that the time spent has no bearing on establishing a *prima facie* case against EATEL.

15. We will not require AT&T to further answer this interrogatory. EATEL has not shown that the information is relevant or is likely to lead to the discovery of admissible evidence.

Interrogatory 3

16. Interrogatory 3 requests that AT&T list and describe all documents, databases and records maintained by AT&T containing information about the amounts actually paid by AT&T to EATEL. AT&T objects on the grounds that the interrogatory is vague, overbroad, and unduly burdensome. EATEL argues that the information is relevant to AT&T's claim that it is unable to ascertain the exact amount of its alleged damages because it requires information exclusively within EATEL's control.

17. We will not require AT&T to answer this interrogatory as crafted. We believe it reasonable, however, to require AT&T to state the amount it actually paid for defendant's services during the relevant period if it possesses such information. We note that we have required defendants to provide certain information to AT&T that should aid AT&T in its computation of damages. As discussed in paragraph 7 of this Order, the defendants are being afforded ample opportunity to challenge AT&T's damage claims and to develop evidence of offsets or other mitigating factors with regard to any claimed damages.

Interrogatory 4

18. Interrogatory 4 requests that AT&T list and describe all Section 208 complaints filed by AT&T against other carriers for alleged violations of the Commission's rate of return prescriptions during the 1987-1988 and 1989-1990 monitoring periods. AT&T objects on the grounds that the information sought is irrelevant, the majority of the information sought is in the public record, and the remainder of the information sought is confidential and proprietary. EATEL contends that this information is relevant to the issue of whether AT&T has filed numerous "cookie cutter" complaints with the Commission in an attempt to obtain automatic refunds in the guise of damages.

19. We will not require AT&T to answer this interrogatory. EATEL has not shown that the requested information is relevant to the complaint filed against it by AT&T. Moreover, any Section 208 complaints filed by AT&T against other carriers are contained in the public files at the Commission and are readily accessible to EATEL and others.

Interrogatories 5, 6, and 7

20. Interrogatories 5, 6, and 7 request information regarding settlements of overearnings disputes between AT&T and other interstate customers including whether such settlement amounts have been reflected in AT&T's annual price cap adjustments and in prices actually charged to AT&T's customers. AT&T objects to these interrogatories as overbroad, excessively burdensome, and irrelevant. In addition, AT&T argues that the information sought by EATEL is privileged and confidential. EATEL contends that the information is relevant to show that AT&T uses threats to obtain settlements and to the issue of whether AT&T has actually been damaged.

21. We will not direct AT&T to answer these interrogatories. EATEL has not shown that the requested information is relevant or is reasonably calculated to lead to the discovery of admissible evidence.[15]

V. CONCLUSION

22. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will afford complainant and defendants the opportunity to engage in further discovery in these proceedings pursuant to the timetable set forth herein. Additionally, we will establish a timeframe for the filing of briefs and reply briefs by complainant and defendants.[16]

VI. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the complainant's Motions to Compel, filed on April 6, 1992, ARE GRANTED to the extent indicated herein and are otherwise DENIED. Defendants shall provide the information to complainant within 30 days of the release date of this Order.

24. IT IS FURTHER ORDERED that East Ascension Telephone Company's Motion to Compel, filed April 13, 1992, IS GRANTED to the extent indicated herein and is otherwise DENIED. Complainant shall provide the information to defendant within 30 days of the release date of this Order.

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[15] Because we do not find the requested information to be relevant, we do not reach AT&T's claims that the requested information regarding settlements is confidential or proprietary.

[16] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

25. IT IS FURTHER ORDERED that the Motions for Extension and Objection, filed March 20, 1992, ARE DENIED.

26. IT IS FURTHER ORDERED that within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 8 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to the complainant within the thirty-day period.

27. IT IS FURTHER ORDERED that the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 7 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

28. IT IS FURTHER ORDERED that the complainant and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainant and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TOWER BROADCASTING CORPORATION File No. BPCT-891107KE

For Construction Permit to
Replace Expired Permit of
Station KSUZ-TV, Abilene, Texas

ORDER

Adopted: July 21, 1992; Released: August 4, 1992

By the Commission:

1. The Commission has before it for consideration: (a) the April 30, 1990, action of the Chief, Video Services Division, denying the above-captioned application of Tower Broadcasting Corporation (Tower) for extension of time within which to construct station KSUZ-TV, Channel 15, Abilene, Texas, cancelling the construction permit, and deleting the call sign; and (b) Tower's May 10, 1990, application for review of that action.

2. We have reviewed the action of the Chief, Video Services Division, and we conclude that the matter was fairly considered and properly decided under applicable precedent. While the permittee does not question the propriety of the staff's analysis or judgment, it does request reinstatement of the permit in order to assign it to a third party. It is well established, however, that the Commission will not grant an extension application solely for the purpose of enabling the permittee of an unbuilt television station to assign its construction permit. *Golden Eagle Communications, Inc.*, 6 FCC Rcd 5127 (1991), *recon. den.*, 7 FCC Rcd 1752 (1992), and cases cited therein.

3. Accordingly, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, Tower Broadcasting Corporation's application for review, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Annual 1991 Access Tariff Filings

Petitions for Reconsideration

ORDER ON RECONSIDERATION

Adopted: July 24, 1992; Released: August 4, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Two local exchange carriers (LECs) -- Cincinnati Bell Telephone Company (CBT) and Lincoln Telephone and Telegraph Company (Lincoln)[1] -- separately filed petitions seeking reconsideration of certain revenue requirement disallowances made in our *1991 Access Tariff Order*.[2] In February 1992 Lincoln asked that its petition be dismissed.[3] For this reason and the other reasons discussed below, we dismiss both petitions.

2. To assist LECs in preparing their 1991 access tariff filings, the Bureau released an order in February 1991 providing instructions and revising our Tariff Review Plan (TRP) formats.[4] On April 2, 1991, the local exchange companies, including CBT, made their 1991 annual access tariff filings.[5] In response to a Public Notice issued by the Bureau on April 18, 1991,[6] CBT, and other LECs refiled their 1991 access tariffs.[7] After evaluating those filings, the Bureau released our *1991 Access Tariff Order* on June 21, 1991. In that Order, we disallowed about $1.8 million of CBT's Telephone Plant-in-Service (TPIS) expenses.[8] After filing tariff revisions in accordance with that Order, CBT filed the above petition in July 1991.

II. PETITION

3. CBT challenges the methodology used by the Bureau to calculate CBT's $1.8 million disallowance. According to CBT, if the Bureau had correctly analyzed the historical cost trend information before it, the disallowance would have been approximately $830,000 instead of $1.8 million. CBT Petition at 1-4. As to CBT's expense projections for the coming tariff year, CBT argues that the statistical model used by the Bureau yields results that are inconsistent with CBT's recent experience and urges replacement of the Bureau's model with a different model that would eliminate all of CBT's disallowances. *Id.* at 9-14.

III. DISCUSSION

4. After reviewing the CBT petition for reconsideration, we conclude that it should be dismissed. The *1991 Access Order* stated that the rate adjustment factors applied to rate of return LECs do not constitute rate prescriptions pursuant to Section 205(a) of the Communications Act, 47 U.S.C. § 205(a), but, rather, represent partial authorizations of rates to the extent necessary to correct erroneous rate development procedures, as set out in the LEC tariff filings and subsequent material of record. Then that Order states[9]

> The LECs are free to file revisions to... [their] rates at any time. Of course, such filings must be accompanied by relevant support information and we would expect a LEC that files rate increases to address fully the considerations which led us to conclude that the rates should be subject to partial authorization under Section 204(b).

5. As we stated in dismissing petitions for reconsideration of the Bureau's Order regarding the annual 1988 access tariff filings, reconsideration is not proper in view of the interlocutory nature of a disallowance ordered pursuant to Section 204(b).[10] Reconsideration petitions can be filed only with respect to "final" actions.[11] For this reason, we conclude that the CBT petition for reconsideration of the *1991 Access Tariff Order* should be dismissed. For this same reason, we grant Lincoln's request for dismissal of its petition.

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[1] Cincinnati Bell Telephone Company, Petition for Reconsideration (filed July 19, 1991), and Lincoln Telephone and Telegraph Company, Petition for Reconsideration (filed July 22, 1991). Neither of these petitions was opposed.

[2] Annual 1991 Access Tariff Filings, Memorandum Opinion and Order, 6 FCC Rcd 3792 (Com.Car.Bur. 1991) (*1991 Access Tariff Order*).

[3] Lincoln Telephone and Telegraph Company, Motion to Dismiss Petition for Reconsideration (filed Feb. 12, 1992).

[4] Commission Requirements for Cost Support To Be Filed With 1991 Annual Access Tariffs, 6 FCC Rcd 1339 (Com.Car.Bur. 1991) (*1991 TRP Order*). *See also* Procedures for 1991 Annual Access Charge Tariffs To Be Filed On Or Before April 2, 1991, 6 FCC Rcd 1854 (Com.Car.Bur. 1991).

[5] *See* Cincinnati Bell Telephone Company, Revisions to Tariff F.C.C. No. 35, Transmittal No. 592, filed Apr. 2, 1991.

[6] Common Carrier Bureau Revises Pleading Schedule for 1991 Annual Access Tariff Filings, Public Notice, DA 91-511 (released Apr. 18, 1991). The Public Notice clarified requirements for the 1991 annual access tariff filing and directed LECs affected by the changes to refile their annual access tariffs.

[7] *See* Cincinnati Bell Telephone Company, Revisions to Tariff F.C.C. No. 35, Transmittal No. 594 (filed May 2, 1991).

[8] *1991 Access Tariff Order*, 6 FCC Rcd at 3897.

[9] *Id.* at 3808.

[10] Annual 1988 Access Tariff Filings, Memorandum Opinion and Order, 3 FCC Rcd 5275, 5276 (Com.Car.Bur. 1988).

[11] *See* Section 1.106(a)(1) of the Commission's Rules, 47 C.F.R. § 1.106(a)(1). *Compare* Section 1.115(a), 47 C.F.R. § 1.115(a) ("[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission.").

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the Motion to Dismiss Petition for Reconsideration filed by the Lincoln Telephone and Telegraph Company IS GRANTED.

7. IT IS FURTHER ORDERED that the petitions filed by Cincinnati Bell Telephone Company and Lincoln Telephone and Telegraph Company, requesting reconsideration of the *1991 Access Tariff Order*, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-320

In the Matter of

Annual 1990 Access Tariff Filings

Petitions for Reconsideration

ORDER ON RECONSIDERATION

Adopted: July 24, 1992; Released: August 4, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On July 23, 1990, three local exchange carriers -- the United Telephone System Companies (United), US West Communications (US West),[1] and GTE Service Corporation and its affiliated domestic telephone operating companies (GTOC)(collectively Petitioners) -- separately filed petitions asking the Common Carrier Bureau (Bureau) to reconsider portions of the Bureau's *1990 Access Tariff Order*.[2] In particular, United, US West, and GTOC each requests Bureau reconsideration of various disallowances made by the Bureau in the carriers' respective access revenue requirements for the 1990-1991 tariff year. On August 2, 1990, MCI Telecommunications Corporation (MCI) filed an opposition to these petitions. On August 7, 1990, American Telephone and Telegraph Company (AT&T) and the Ad Hoc Telecommunications Users Committee (Ad Hoc) filed their oppositions. US West filed a reply to these oppositions on August 17, 1990, while GTOC filed its reply on August 20, 1990. For the reasons discussed below, we dismiss these petitions for reconsideration.

II. PLEADINGS

2. Both petitioners and their opponents challenge the Bureau's use of Section 204(b) of the Communications Act, 47 U.S.C. § 204(b). US West objects to the Bureau's use of Section 204(b), claiming that this section does not authorize the Commission to order such reductions under the "guise" of a partial authorization without carrier consent. US West also says that Section 204(b) does not expand the Commission's ability to prescribe rates except through the procedures enacted in Section 205 of the Act, 47 U.S.C. § 205. US West Petition at 2 n.5. *See also* US West Reply at 8-9. *Accord* GTOC Petition at 1-2.

3. Noting language to the contrary in the *1990 Access Tariff Order*, Ad Hoc rejects these contentions that the Bureau's partial authorizations are improper "rate prescriptions." Ad Hoc further argues that Petitioners had adequate opportunity to participate in these proceedings and, thus, their consent is not required prior to such partial authorizations. Ad Hoc Opposition at 4-6. *Accord* MCI Opposition at 1-5.

4. GTOC also argues that the Bureau's imposition of rate adjustment factors (RAFs) exceeds the Bureau's statutory authority and ignores the underlying statutory basis for carrier-initiated rates. GTOC Reply at 3. US West renews its earlier contention that the Commission does not have the authority to lower existing rates or reduce requested rates pursuant to Section 204(b) without carrier consent. US West Reply at 9.

5. Noting the interlocutory nature of the Bureau's 1990 access order, MCI contends that reconsideration of that order is not appropriate and that these three petitions should be dismissed. MCI Petition at 6. *Accord* AT&T Petition at 2-5 (citing the Bureau's dismissal of similar petitions for reconsideration of the Bureau's 1988 and 1989 Access Tariff Orders). GTOC disputes AT&T's claim that the *1990 Access Tariff Order* only tentatively disallowed portions of the LEC's annual access tariffs. GTOC says that if the *1990 Access Tariff Order* were viewed as interlocutory, the LECs would have no opportunity to challenge the decision as contrary to the Communications Act and the Administrative Procedure Act. GTOC Reply at 2-3. GTOC adds that it does not agree with the Bureau's previous orders dismissing petitions for reconsideration of the Bureau's 1988 and 1989 annual access orders. *Id.* at 3 (noting that its April 1989 application for review of this issue is still pending and arguing that, until the Commission rules on that matter, earlier Bureau dismissal orders should not be relied upon).[3]

III. DISCUSSION

6. After reviewing the above petitions for reconsideration and associated pleadings, we conclude that these petitions should be dismissed. The *1990 Access Tariff Order* stated that the RAFs applied to rate of return LECs do not constitute rate prescriptions pursuant to Section 205(a) of the Communications Act, 47 U.S.C. § 205(a), but, rather, represent partial authorizations of rates to the extent necessary to correct erroneous rate development procedures, as set out in the LEC tariff filings and subsequent material of record. Then that Order states[4]

> The LECs are free to file revisions to the resultant rates at any time. Of course, such filings must be accompanied by relevant cost support information

[1] US West includes The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company.

[2] Annual 1990 Access Tariff Filings, Memorandum Opinion and Order, 5 FCC Rcd 4177 (Com.Car.Bur. 1990) (*1990 Access Tariff Order*). *See also* Annual 1990 Access Tariff Filings, Order, 5 FCC 4142 (Com.Car.Bur. 1990).

[3] In view of our dismissal of these three petitions on procedural grounds, we do not discuss the substantive arguments raised by Petitioners or the responses of MCI, AT&T, and Ad Hoc to those arguments.

[4] *1990 Access Tariff Order*, 5 FCC Rcd at 4236.

and we would expect a LEC that files rate increases to address fully the considerations which led us to conclude that the rates filed in these transmittals should be subject to Section 204(b) partial authorization.

7. As we stated in dismissing petitions for reconsideration of the Bureau's Order regarding the annual 1988 access tariff filings, reconsideration is not proper in view of the interlocutory nature of a disallowance ordered pursuant to Section 204(b).[5] Reconsideration petitions can be filed only with respect to "final" actions.[6] For the same reason, we conclude that these three petitions for reconsideration of the *1990 Access Tariff Order* should be dismissed as well.

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED that the petitions filed by the United Telephone System Companies, US West Communications, and GTE Service Corporation and its affiliated domestic telephone operating companies, requesting reconsideration of the *1990 Access Tariff Order*, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[5] Annual 1988 Access Tariff Filings, Memorandum Opinion and Order, 3 FCC Rcd 5275, 5276 (Com.Car.Bur. 1988).

[6] *See* Section 1.106(a)(1) of the Commission's Rules, 47 C.F.R. § 1.106(a)(1). *Compare* Section 1.115(a), 47 C.F.R. § 1.115(a) ("[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission.").

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Annual 1989 Access Tariff Filings

Petition for Reconsideration
of June 29 Order

ORDER ON RECONSIDERATION

Adopted: July 24, 1992; Released: August 4, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In its annual 1989 access tariff order, the Common Carrier Bureau (Bureau) disallowed approximately $24 million of the New England Telephone and Telegraph Company's (NET's) projected revenue requirement for the 1989-1990 tariff year.[1] Subsequently, NET filed two tariff transmittals to recover the $24 million disallowed by the Bureau in the *March 22 Order*.[2] On June 29, 1989, the Bureau released an order, which, *inter alia*, rejected these NET transmittals.[3] NET then filed this petition asking the Bureau to reconsider the $24 million disallowance imposed on NET by the Bureau in its *March 22 Order* and affirmed in the Bureau's *June 29 Order*.[4] On August 15, 1989, the American Telephone and Telegraph Company (AT&T) and MCI Telecommunications Corporation (MCI) filed oppositions to the NET petition. NET filed its reply on August 25, 1989. For the reasons discussed below, we dismiss this petition for reconsideration. However, our dismissal is without prejudice to any action the Commission may take on NET's separate application for review of the *June 29 Order*.[5]

II. PLEADINGS

2. NET contends that the *June 29 Order* was a final order and thus reviewable because that Bureau Order stated that any future LEC tariff filings would have to comply with all of the requirements of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. In its opposition, AT&T responds that NET's petition for reconsideration should be dismissed because the Bureau's tentative disallowances represent interlocutory decisions. AT&T notes that Section 1.106(a)(1) of the Commission's Rules applies to "final actions taken pursuant to delegated authority," and thus precludes reconsideration of such interlocutory rulings. AT&T adds that the Bureau made clear that a tentative disallowance pursuant to Section 204(b) is interlocutory and, hence, unreviewable. AT&T Opposition at 2 n.*. AT&T also claims that NET is incorrect in asserting that the *June 29 Order* is "final" merely because it states that future tariff filings would have to comply with Section 61.38. AT&T contends that NET, like other LECs, remains free to file new rates with full cost support or to apply for a Section 61.38 waiver in the future. *Id.* at 2 n.*.[6]

III. DISCUSSION

3. After reviewing the above petition for reconsideration and the associated pleadings, we conclude that this petition should be dismissed. In the *March 22 Order*,[7] we stated that the rate adjustment factors applied to rate of return LECs such as NET do not constitute rate prescriptions pursuant to Section 205(a) of the Communications Act, 47 U.S.C. § 205(a), but, rather, represent partial authorizations of rates to the extent necessary to correct erroneous rate development procedures, as set out in the LEC tariff filings and subsequent material of record. That Order further states[8]

> The LECs are free to file revisions to the resultant rates at any time. Of course, such filings must be accompanied by relevant cost support information and we would expect a LEC that files rate increases to address fully the considerations which led us to conclude that the rates filed in these transmittals should be subject to Section 204(b) partial authorization.

4. As we stated in dismissing petitions for reconsideration of the Bureau's Order regarding the annual 1988 access tariff filings, reconsideration is not proper in view of the interlocutory nature of a disallowance ordered pursuant to Section 204(b).[9] Reconsideration petitions can be filed only with respect to "final" actions.[10] For the same reason, we conclude that the above NET petition for reconsideration of the *June 29 Order* should be dismissed as well.

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[1] *See* Annual 1989 Access Tariff Filings, Memorandum Opinion and Order, 4 FCC Rcd 3638 (Com.Car.Bur. 1989) (*March 22 Order*), *petitions for recon. denied*, 4 FCC Rcd 5684 (Com.Car.Bur. 1989), *applications for rev. pending*.

[2] NET Transmittal No. 990 (filed May 3, 1989) and NET Transmittal No. 993 (filed May 15, 1989).

[3] *See* Local Exchange Carrier Access Rate Levels, Memorandum Opinion and Order, 4 FCC Rcd 5533 (Com.Car.Bur. 1989) (*June 29 Order*), *applications for rev. pending*.

[4] New England Telephone and Telegraph Company, Local Exchange Carrier Access Tariff Rate Levels, Petition for Reconsideration (filed July 31, 1989).

[5] New England Telephone and Telegraph Company, Local Exchange Carrier Access Tariff Rate Levels, Application for Review (filed July 31, 1989).

[6] In view of our dismissal of NET's petition on procedural grounds, we do not discuss NET's substantive arguments or the responses of AT&T and MCI to those arguments.

[7] *March 22 Order*, 4 FCC Rcd at 3707.

[8] Annual 1990 Access Tariff Filings, CC Docket No. 90-320, 5 FCC Rcd 4177, 4236 (Com.Car.Bur. 1990).

[9] Annual 1988 Access Tariff Filings, Memorandum Opinion and Order, 3 FCC Rcd 5275, 5276 (Com.Car.Bur. 1988).

[10] *See* Section 1.106(a)(1) of the Commission's Rules, 47 C.F.R. § 1.106(a)(1). *Compare* Section 1.115(a), 47 C.F.R. § 1.115(a) ("[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission.").

IV. ORDERING CLAUSE

5. Accordingly, IT IS ORDERED that the petition filed by the New England Telephone and Telegraph Company requesting reconsideration of the *June 29 Order* IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-159

In the Matter of

Amendment of the Commission's
Rules To Permit FM Channel and Class
Modifications by Application.

NOTICE OF PROPOSED RULE MAKING

Adopted: July 16, 1992; Released: August 4, 1992

Comment Date: October 5, 1992
Reply Comment Date: November 4, 1992

By the Commission:

1. We initiate this proceeding on our own motion to propose changes in our rules governing certain modifications of existing FM authorizations. Specifically, we seek comment on whether licensees and permittees should be allowed to request by application upgrades on adjacent and co-channels,[1] modifications to adjacent channels of the same class, and downgrades to adjacent channels.[2] Licensees and permittees currently must request these changes through a two-step process in which the party first files a petition for rule making and, if the petition is granted, then an application. We propose to streamline this process by eliminating the rulemaking step in circumstances where it largely duplicates the application process, and instead allow a licensee or permittee to seek such modifications by application alone. Grant of the application would be followed by an amendment to the FM Table of Allotments to reflect the modification.[3]

Existing Processes

2. Currently, an FM licensee or permittee seeking an upgrade on an adjacent or co-channel, a modification to an adjacent channel of the same class or a downgrade to an adjacent channel first must file a petition for rule making to amend the FM Table of Allotments.[4] In each instance, the petition is initially analyzed to determine whether it will meet Commission technical requirements, including minimum distance separation[5] and city grade coverage.[6] If this analysis indicates that the proposed channel could be allotted, the Commission issues a *Notice of Proposed Rule Making* (*"NPRM"*) seeking comment on the allotment and designating dates by which comments and reply comments must be filed.[7] If a modification request requires a change in the frequency of any other authorized station, we issue simultaneously with the *NPRM* an *Order to Show Cause* to the affected licensee or permittee to demonstrate why its frequency should not be changed, as provided by Section 316 of the Communications Act, as amended. If a request requires the change in frequency of an allotted but vacant channel in order to accommodate the proposal, we provide an opportunity for comment on the substitution. During this period, parties may file counterproposals suggesting alternate, mutually exclusive uses of the spectrum in other communities.[8] If the Commission determines that grant of the proposal is in the public interest, it issues a *Report and Order* modifying the license or permit to specify the new channel, amending the Table of Allotments and requiring the petitioner to file, within ninety days of the effective date of the *Report and Order*, a minor change construction permit application specifying the upgraded channel . The petitioner is also required to file any relevant fees with the minor change application.

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[1] Adjacent channels include the three channels above and the three channels below the specified channel. A co-channel is the channel occupied under the licensee's or permittee's existing authorization. Pursuant to Section 1.420(g)(3) of the Commission's Rules, for instance, a licensee operating on Channel 250A may seek a channel upgrade on Channels 247, 248, 249, 251, 252, or 253, or on its existing channel.

[2] Pursuant to Section 73.3573, a licensee or permittee currently may request a co-channel downgrade by application. *See Report and Order, MM Docket 88-118*, 4 FCC Rcd 2413 (1989).

[3] Such amendments would be treated as minor and non-controversial as they would simply reflect authorized station operations, and there would thus be good cause for proceeding without notice and comment and for making the rule change effective upon publication in the Federal Register. *See* 5 U.S.C. Section 553 (b)(B)(d).

[4] Section 1.420 of the Commission's Rules governs procedures in proceedings to amend the FM Table of Allotments. Section 1.420(g), which specifically addresses upgrades, states in pertinent part:

> The Commission may modify the license or permit of an FM station to another class of channel... in the course of a rule making to amend Section 73.202(b)... if any of the following conditions are met:
>
> (1) There is no other timely filed expression of interest, or
>
> (2) If another interest in the proposed channel is timely filed an additional equivalent class channel is also allotted, assigned or available for application, or
>
> (3)...[T]he modification of license or permit would occur on a mutually exclusive higher class adjacent or co-channel.

[5] 47 C.F.R. Section 73.207; *See Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572 (1990)*rev. denied sub nom. Chester County Broadcasting Co. v. FCC*, Case No. 90-1496, (D.C. Cir. June 6, 1991).

[6] 47 C.F.R. Section 73.315(a); *see, e.g., Greenwood, South Carolina*, 3 FCC Rcd 4108 (1988), *corrected*, 3 FCC Rcd 4374 (1988).

[7] At this stage, the Commission also requests concurrence by the Canadian or Mexican governments if required.

[8] Parties may also express an interest in applying for the channel to which a station proposes to upgrade unless the proposal is for an adjacent or co-channel upgrade. *See* 47 C.F.R. Section 1.420(g); *Report and Order, MM Docket 85-313*, 60 RR 2d 114 (1986).

3. Once the minor change construction permit application is received, a tenderability review is performed in which the application is examined for completeness. The application is then placed on a *Public Notice of Tenderability/Acceptability*. The application undergoes an engineering analysis to verify compliance with the Commission's Rules regarding minimum distance separation, city grade coverage, and station class requirements with respect to tower height and operating power. The proposed transmitter site is also checked for compliance with requirements regarding environmental concerns, and for requirements regarding tower height and proximity to airports. If the application complies with all relevant requirements, a construction permit is issued.

4. An applicant generally specifies the nature of its technical proposal in greater detail than a rulemaking petitioner.[9] Normally, however, a licensee or permittee will specify the same site in both the petition for rule making and in the application. In such instances, the engineering analysis for the application is generally duplicative of the analysis performed on the rulemaking petition. In those instances where the applicant specifies a different site than proposed in the rulemaking proceeding, it does so generally because in developing the more comprehensive technical proposal required by an application, it found its earlier proposed site unsuitable. As part of its more detailed showing, an applicant also may employ the contour protection provisions of Section 73.215 of the Rules to propose facilities that would otherwise be short-spaced to existing stations.[10]

5. Both the rulemaking and the application stages offer an opportunity for parties to oppose the proposed modification. A party may file an objection or counterproposal during the comment period in response to the *NPRM*, and may also file an informal objection pursuant to Section 73.3587 of the Rules at any time prior to the grant of the implementing application.[11]

Discussion

6. We propose that licensees and permittees be permitted to request adjacent and co-channel upgrades, same class adjacent channel substitutions, and adjacent channel downgrades in a one-step process through the filing of a minor change construction permit application. We believe that using such a process for each of these classes of actions would serve the public interest by speeding the implementation of service modifications[12] and eliminating redundant staff processing efforts.[13] With respect to upgrades, these actions generally provide enhanced service to the public. Allowing adjacent channel downgrades may provide some flexibility to utilize allotments that may be unusable due to recently adopted enhanced spacing requirements.[14] Permitting same class adjacent channel substitutions will enable some licensees and permittees to increase power by operating as 6 kW Class A stations. The comprehensive engineering analysis performed with respect to applications in each of these areas subsumes the analysis performed at the rulemaking stage. This unnecessary duplication of effort may impose unnecessary costs on both the stations seeking modifications and the Commission's resources.[15]

7. Nonetheless, while we believe that eliminating unnecessary duplication in our processes would serve the public interest, we also believe that it may be desirable to place some limits on the ability to invoke these processes in order to avoid harming core policy objectives. Specifically, we note that there are some types of showings that are considered acceptable in connection with applications, such as contour protection showings pursuant to Section 73.215 of the Rules and showings of "substantial compliance" with our city grade coverage requirements, that we have expressly declined to consider in connection with allotment proceedings.[16] In order to prevent the allotment of channels that would conflict with our present allotment standards, we propose to limit the availability of the new one-step procedure only to those proposals that comply with both our application criteria and our allotment standards. We seek comment on the best means of reaching this objective. One option would be to require that any application filed pursuant to the new procedure meet minimum distance separation and city grade standards as

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[9] However, there are instances in which a rulemaking petitioner may wish to file a detailed engineering showing. *See, e.g., Woodstock and Broadway, Virginia*, 2 FCC Rcd 7064 (1987) (engineering report detailing actual rather than theoretical terrain characteristics accepted in allotment proceeding to demonstrate compliance with city grade coverage requirements).

[10] *See Report and Order, MM Docket 87-121*, 4 FCC Rcd 1681 (1989) (Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas).

[11] As a minor change, the application is not subject to the thirty day petition to deny period required by Section 309 of the Communications Act of 1934, 47 U.S.C. Section 309, as amended.

[12] Currently, a typical rulemaking proceeding takes at least six months to complete. Removing the rulemaking stage from the process should reduce the length of time necessary to approve a modification request.

[13] Under this procedure, any notification to the Canadian or Mexican governments would be made after the application is filed.

[14] *See Memorandum Opinion and Order, MM Docket 88-375*, 6 FCC Rcd 3417 (1991) (amendment of Part 73 of the Rules to provide for an additional FM station class (Class C3) and to increase the maximum transmitting power for Class A stations), *affirming Third Report and Order, MM Docket 88-375*, 4 FCC Rcd 3557 (1989) (establishing IF separations), *Second Report and Order*, 4 FCC Rcd 6375 (1989) (setting 6 kW limit for Class A FM stations), *First Report and Order, MM Docket 88-375*, 4 FCC Rcd 2792 (1989) (establishing Class C3 FM stations).

[15] In a similar context, we previously decided to allow downgrading of stations by minor change application to avoid unnecessary duplication. *See Report and Order, MM Docket 88-118*, 4 FCC Rcd 2413 (1989).

[16] In adopting rules allowing short spacing through the use of contour protection, we expressly declined to allow contour protection as an allotment tool. *See Report and Order, MM Docket 87-121*, 4 FCC Rcd 1681 (1989). With respect to city grade coverage, *compare Southwest Communications, Inc.*, released July 16, 1986 (letter from Chief, FM Branch) (application standard of 80% coverage considered "substantial compliance" pursuant to city grade coverage requirement of Section 73.315 of the Rules) *with Greenwood, South Carolina*, 3 FCC Rcd 4108 (1988), *corrected*, 3 FCC Rcd 4374 (1988) (allotment standard requires 100% city grade coverage pursuant to Section 73.315 of the Rules).

applied in the allotment context, without making use of less restrictive application standards such as contour protection or substantial compliance, at the site specified in the application. Another option would be to allow an applicant to apply for a station modification at a site that would not meet allotment standards, so long as the applicant can demonstrate that an available site exists which would comply with allotment standards. Our two-step process generally allows such a result. We invite comment on these issues.

8. We also propose to limit this procedure to modifications that require no changes to the Table of Allotments other than a change in the allotment of the station seeking the modification. We believe that the rulemaking process is the most efficient method of soliciting comments in those instances in which a proposal would require changes to the allotments of third party stations, and that such proposals should thus continue to be subject to rulemaking proceedings. Furthermore, we are not proposing that this process should apply to non-adjacent channel upgrades. We believe that the allotment of nonadjacent upgrades must remain within the purview of notice and comment rule making. This is because non-adjacent channel upgrades, pursuant to Section 1.420(g), are subject to competing expressions of interest, although the petitioner may propose the allotment of an additional equivalent channel to the community to accomodate those expressions of interest. Solicitation of such expressions of interest, we believe, is best achieved through a rulemaking proceeding.

9. We also seek comment on several additional issues. In a *Report and Order* adopted simultaneously with this *Notice*, the Commission established rules whereby minor change applications are cut off from the filing of mutually exclusive petitions for rule making as of the day the applications are received at the Commission. *See Report and Order, MM Docket No. 91-348*, FCC No. 92-329, adopted July 16, 1992 (*"Conflicts"*). We propose that the same cut-off rule should apply with respect to any application filed pursuant to this new procedure. We tentatively conclude that the delay to applicants caused by unlimited exposure to potentially conflicting rulemaking petitions would be inequitable and inconsistent with our treatment of other applications pursuant to the new rule adopted today. Establishing cut-off procedures such as these will provide certainty to applicants in terms of exposure to conflicting proposals.[17] Moreover, this proposed approach is consistent with our continuing efforts to encourage FM licensees to seek to improve service to the public by removing the risk to their existing authorizations where doing so does not unfairly prejudice new applicants.[18]

10. We realize that adoption of the cut-off rules established in *Conflicts, supra*, will remove the ability of parties to file counterproposals seeking conflicting uses of the spectrum. We tentatively conclude that the *Ashbacker* doctrine[19] does not preclude adoption of the changes contemplated herein. In *Ashbacker*, the United States Supreme Court held that where two *bona fide* applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give it. However, the Court has noted that the Commission can promulgate rules limiting eligibility to apply for a channel when such action promotes the public interest, convenience and necessity.[20] As stated in Paragraph 6 *supra*, we believe the changes proposed herein would serve the public interest because enhanced service to the public would be expedited. Furthermore, in *Reuters Ltd. v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986), the Court of Appeals noted that *Ashbacker* applies only to parties who are applicants, and not to prospective applicants. A party seeking to amend the FM Table of Allotments is a "prospective applicant" until its application is submitted and accepted pursuant to the Commission's Rules.[21]

11. We recognize that adoption of this proposal may restrict the ability of other parties to file counterproposals seeking competing uses of the spectrum that would be precluded by grant of the application. This proposal, however, is consistent with the approach adopted in *Conflicts, supra*. We tentatively conclude that limiting the applicability of the procedure proposed herein only to those modification requests which could meet the requirements of a rulemaking proposal provides other parties with the ability to predict with certainty any preclusive effect that a potential modification may have on FM spectrum availability in the area. The operation of stations on adjacent and co-channels in neighboring communities in conjunction with our minimum distance separation and city grade coverage requirements necessarily limits the maximum power, maximum height and location that a licensee or permittee could request in its application. Therefore, we believe that a prospective petitioner could readily predict whether a particular station potentially could seek a modification by application, thereby enabling the petitioner to file a conflicting request in advance of that application. To the extent that this new procedure may foreclose any potential petitioner's opportunity to request a modification, we be-

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[17] We recognize that certain situations may arise in which a pending rule making may conflict with a pending application. In the event an application to upgrade a station is not protected by our cut-off rules from a mutually exclusive petition for rule making, we propose to continue our practice of resolving the conflict between the two proposals in the context of the allotment proceeding in which the rulemaking petition is addressed.

[18] *See Report and Order, MM Docket 83-1148*, 56 RR 2d 1253 (1984)(amendment of the Commission's Rules allowing the upgrade of FM and TV Station licenses where additional equivalent channel available to accomodate competing expressions of interest); *Report and Order, MM Docket 85-313*, 60 RR 2d 114 (1986) (amendment of the Commission's Rules allowing adjacent and co-channel upgrades without entertaining competing expressions of interest); *see also Report and Order, MM Docket 88-526* (amendment of the Commission's Rules allowing change of community of license without being subject to competing applications), 4 FCC Rcd 4870 (1989) *recon. denied*, 5 FCC Rcd 7094 (1990).

[19] *Ashbacker v. U.S.*, 326 U.S. 327 (1945).

[20] *U.S. v. Storer*, 351 U.S. 192 (1956).

[21] *See also Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1561 (D.C. Cir. 1987) ("only by compliance with such procedures may an application enter the ranks of '*bona fide* applications' protected by *Ashbacker*"). The Commission employed a similar analysis in adopting Section 1.420(i) of its Rules, which permits FM and television licensees and permittees to seek a change in community of license without facing competing applications. *See* 4 FCC Rcd 4870, 4873 (1989).

lieve that it would be balanced by the certainty and protection from exposure to conflicting requests that the new procedure would provide.

12. We propose that any changes adopted in this proceeding apply only to applications filed after the effective date of the rules. Any rulemaking petitions already filed, or on file on the effective date of the new rules, would be processed under existing procedures. We seek comment on this approach.

Conclusion

13. We believe that the two-step Commission procedure for adjacent and co-channel upgrades, same class channel substitutions and adjacent channel downgrades of FM authorizations can be streamlined by eliminating the rulemaking step in certain situations which require duplicative Commission engineering analyses. This will enhance service to the public by expediting the institution of modifications of service. We seek comment on these proposals generally and on the specific proposed rules intended to implement them. The proposed rules are contained in Appendix A. We also invite comments on alternative proposals.

Procedural Matters

14. *Ex parte rules - non-restricted proceeding.* This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

15. *Comment dates.* Pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **October 5, 1992,** and reply comments on or before **November 4, 1992.** To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554.

16. *Regulatory Flexibility Act.* An initial Regulatory Flexibility Analysis is contained in Appendix B.

17. Authority for this action is contained in 47 U.S.C. Sections 154 and 303.

18. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

It is proposed that Parts 1 and 73 of the Code of Federal Regulations be amended to read as follows:

1. The authority citation for Parts 1 and 73 continues to read as follows:

AUTHORITY: 47 U.S.C. Sections 154 and 303.

2. Section 1.420 is amended by adding Note 1 following paragraph (g) and redesignating the Note following paragraph (h) as Note 2 to read as follows:

Section 1.420 Additional procedures in proceedings for amendment of the FM, TV or Air-Ground Table of Allotments.

* * * * *

NOTE 1: In certain situations, a licensee or permittee may seek an adjacent or co-channel upgrade by application. *See* Section 73.203(b).

* * * * *

1. Section 73.203 is amended by revising paragraph (b) and adding a Note to read as follows:

Section 73.203 Availability of channels.

* * * * *

(b) Applications filed on a first come, first served basis may propose a lower or higher class channel. Applications for the modification of an existing FM broadcast station may propose a lower or higher class adjacent or co-channel, or an equivalent class adjacent channel. In these cases, the applicant need not file a petition for rule making to amend the Table of Allotments (Section 73.202(b)) to specify the modified channel class.

Note: Changes in channel class, and equivalent channel class substitutions by application are limited to first, second and third adjacent and co-channel modifications which meet the minimum spacing requirements of Section 73.207 of the Rules at the site specified in the application, without resort to the provisions of the Commission's Rules permitting short spaced stations as set forth in Sections 73.213-215 of the Rules, and to requests which require no other changes to the FM Table of Allotments or any change in frequency of any other authorized station.

2. Section 73.3573 is amended by revising paragraph (a)(1), adding Note 1 and redesignating Notes 1 and 2 as Notes 2 and 3 accordingly, to read as follows:

Section 73.3573 Processing FM broadcast station applications.

(a) Applications for FM broadcast stations are divided into two groups:

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. A major change for FM station authorized under this part is any change in frequency or community of license which is in accord with a present allotment contained in the Table of Allotments (73.202(b)). Other requests for change in frequency or community of license for FM stations must first be submitted in the form of a petition for rule making to amend the Table of Allotments. Applications filed

on a first come, first served basis may propose a higher or lower class adjacent or co-channel in an application for a new FM broadcast station. A licensee or permittee may seek the higher or lower class adjacent or co-channel or an equivalent class adjacent channel of its existing FM broadcast station by filing a minor change application. For noncommercial educational FM stations, a major change is any change in frequency or community of license or any change in power or antenna location or height above average terrain (or combination thereof) which would result in a change of 50% or more in the area within the station's predicted 1 mV/m field strength contour. (A change in area is defined as the sum of the area gained and the area lost as a percentage of the original area). However, the FCC may within 15 days after the acceptance of the application for modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore subject to the provisions of Sections 73.3580 and 1.1111 pertaining to major changes.

Note 1: Applications to modify the channel and/or class of an FM broadcast station to an adjacent or co-channel shall not require any other amendments to the Table of Allotments or change in frequency of any other authorized station. Such applications also must meet the minimum spacing requirements of Section 73.207 of the Rules, at the site specified in the application, without resort to the provisions of the Commission's Rules permitting short spaced stations as set forth in Sections 73.213-215 of the Rules.

* * * * *

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

I. Reason for the Action:

This review is initiated to consider whether it is advisable to adopt a new procedure by which a licensee or permittee may request a modified channel or class.

II. Objectives of the Action

The objective of this proceeding is to reduce the amount of time necessary for approval of certain modifications and speed the implementation of improved FM service, as well as to reduce the amount of duplication of staff effort in processing such requests.

III. Legal Basis:

Authority for this action may be found in 47 U.S.C. Sections 154 and 303.

IV. Reporting, record keeping, and other compliance requirements:

Such requirements will vary according to the actions that are adopted as a result of the record established in response to this *Notice of Proposed Rule Making*.

V. Federal rules which overlap, duplicate, or conflict with these rules:

There are no rules which would overlap, duplicate, or conflict with these rules.

VI. Description, potential impact and number of small entities involved:

There are a number of radio licensees and permittees who would be affected by this proceeding.

VII. Any significant alternatives minimizing the impact on small entities consistent with stated objectives:

In initiating this change to our modification procedures, the Commission seeks to relieve parties of the burden of filing duplicate requests, reduce the time necessary for approval of a modification and speed the implementation of improved FM service. In this *Notice of Proposed Rule Making*, the Commission invites comments on the alternative methods of applying this new process.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-168

In the Matter of

Modifying Renewal Dates for
Certain Stations Licensed
Under Part 74 of the
Commission's Rules; and

Revising FCC Form 303-S, Application
for Renewal of License for Commercial
and Noncommercial AM, FM or TV
Broadcast Station

NOTICE OF PROPOSED RULE MAKING

Adopted: July 24, 1992; Released: August 4, 1992

Comment Date: September 28, 1992
Reply Comment Date: October 19, 1992

By the Commission:

I. INTRODUCTION

1. We initiate this proceeding on our own motion to consider changing the license renewal dates for several types of stations licensed under Part 74 of the Commission's Rules in order to simplify and reduce the paperwork associated with the renewal process. Specifically, we propose to change the license renewal dates of FM and TV translator stations and low power television ("LPTV") stations to that of full power stations operating in the same state.[1] We believe this action could streamline the license renewal process and eliminate unnecessary paperwork and administrative burdens on licensees and the Commission. In addition, we believe that the proposals contained herein could simplify the renewal process for interested members of the public. To this end, we also propose to revise FCC Form 303-S to permit the use of a single renewal application form by licensees of full power broadcast stations, which also seek to renew their commonly owned translator or LPTV stations that have the same renewal dates.

II. BACKGROUND

2. Unlike the license expiration schedule for most of the other services licensed under Part 74, the schedule for FM and TV translators and LPTV stations is not the same as that for full power broadcast stations in the same state. Translator and LPTV stations are licensed for terms determined by a uniform renewal schedule for the state in which they are located, but this schedule is not concurrent with the similar renewal schedule for full power stations.[2] Under current rules, then, a single licensee may be required to file, at different times, multiple applications with the Commission. The information called for by these separate application forms (FCC Forms 303-S and 348) is substantially similar in nature.

III. DISCUSSION

3. The difference in renewal dates places an unnecessary administrative burden on both licensees and the Commission. Currently, licensees of full power stations that own several translators or LPTV stations must file a separate renewal application for each station. This is true even where the full power station and the secondary station have the same renewal date or are located in the same state. By conforming the expiration dates of broadcast stations located in the same state, and allowing a broadcaster to file a single renewal application to cover all of its broadcast stations having the same renewal date, we could decrease the administrative burden to full power station licensees that also own translators or LPTV stations. In addition, it has been our experience that translator licensees often file renewal applications based on the expiration date of the primary station being rebroadcast. In such cases, the staff is required to return the renewal applications and any associated filing fees. Where a translator licensee fails to file a renewal application because of a mistaken understanding of the actual renewal date, the staff has to spend considerable time trying to determine the status of the translator station. In either instance, the confusion results in additional expenses to licensees and the waste of Commission resources. Further, we believe that under the current system, it may be more difficult than necessary for the public to follow the licensing process because different stations in the same area may have different renewal dates. This difficulty may be compounded by the fact that, in the case of translator stations, the translator retransmits notices announcing the license renewal of the primary station at a time when the translator's license is not being renewed.

4. We believe that the relicensing process could be structured more efficiently if we conform the renewal dates of FM and TV translators and LPTV stations to the license period of full power stations, and if we eliminate or minimize to the greatest extent possible multiple renewal filings by licensees of commonly owned full power and translator and LPTV stations. Further, we believe that public awareness of the renewal process would be maximized by such action.

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[1] In accord with Section 74.15(f) of the Commission's Rules, licenses for independently owned TV broadcast auxiliary stations as defined in Section 74.601 are issued for a period of five years beginning with the date of grant. For reasons similar to those discussed *infra*, we propose to conform the license expiration schedule of these auxiliary stations to that of full power TV broadcast stations operating in the same state.

[2] *Compare* Section 73.1020 *with* Section 74.15 of the Commission's Rules, 47 C.F.R. §§ 73.1020 and 74.15.

5. The information currently elicited from renewal applicants for full power commercial radio and TV broadcast stations is virtually the same as that called for from licensees of translator and LPTV stations seeking renewal of their stations.[3] By conforming the license renewal dates in the manner proffered, and by revising FCC Form 303-S, we propose to allow licensees of full power radio and TV broadcast stations to utilize a single application form to renew simultaneously the authorizations for their commonly owned translators and LPTV stations that have the same license renewal dates.[4] This proposal should further eliminate administrative and paperwork burdens and promote a better understanding of the renewal process on the part of our licensees and the public.

6. We are cognizant that the transition to a revised renewal schedule may implicate certain statutory considerations. Specifically, Section 307(c) of the Communications Act prohibits lengthening television and radio broadcast license terms beyond five and seven years, respectively. We also believe shortening the terms of existing licenses in these circumstances could result in confusion or unfairness. In order to avoid the problems associated with lengthening the term of current licenses for translator or LPTV stations, we propose to leave the terms of existing licenses unchanged, and we will continue to grant authorizations for new stations in accordance with the schedule set forth in 74.15(d) of the Commission's Rules. This will enable us to effectuate the proposed change in an efficient, comprehensive manner. For existing LPTV or translator stations, we would renew licenses, when the occasion arises, for a shorter term to expire in accordance with the schedule for full power broadcast stations set forth in Section 73.1020 of the Commission's Rules.[5] We tentatively conclude that the public interest, convenience and necessity would be served by establishing greater consistency in the licensing process, as we now propose to do. The process of changing to the new schedule may require the filing of two applications for some LPTV or translator stations within a short period of time, but we believe this will ultimately result in greater efficiency. We invite comment on this proposal. Would adoption of our proposal, including one-time short-term renewals for some licensees, on balance reduce this burden? Are there merits to the current licensing structure that would be lost if the proposed change in renewal dates were adopted?

IV. CONCLUSION

7. We have initiated this proceeding in order to make our licensing of stations authorized in Part 74 of the Commission's Rules more efficient and less burdensome to the public, licensees and the Commission. We believe that conforming the license period of certain TV broadcast auxiliary stations, translator stations and LPTV stations to the extent set forth above, with the license period of full power stations, will simplify our relicensing process and thus ease administrative and regulatory burdens.

V. ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

8. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

9. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **September 28, 1992,** and reply comments on or before **October 19, 1992.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Regulatory Flexibility Act

10. An Initial Regulatory Flexibility Analysis is contained in Appendix A of this Notice of Proposed Rule Making.

11. Authority for this action is contained in 47 U.S.C. Sections 154 and 303.

Additional Information

12. For additional information on this proceeding, contact Eugenia R. Hull or David E. Horowitz, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[3] Compare FCC Form 303-S with FCC Form 348.

[4] Under Section 73.1020 and Section 74.15(d) of our Rules, broadcast stations are licensed by regions, consisting of one or more states. For example, the licenses of full power broadcast stations located in Delaware and Pennsylvania expire at the same time. Under our proposal, the licensee of a full power station would be permitted to file for renewal of the full power station and all LPTV and translator stations located in Delaware and Pennsylvania on one application.

[5] Section 307(c) of the Act authorizes the Commission to establish the period or periods for which licenses shall be granted or renewed and allows the Commission to grant or renew a license for a shorter period than that prescribed if the public interest, convenience or necessity would be served by such action. 47 U.S.C. § 307(c)

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by § 603 of the Regulatory Flexibility Act, the Commission has prepared the following Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981)).

I. Reason for Action

The purpose of this *Notice* is to consider changes to the Commission's Rules governing the timing for renewal of TV auxiliary broadcast, FM and TV translator and low power TV station licenses.

II. Objectives

This action is intended to reduce unnecessary administrative and paperwork burdens on the Commission and on licensees of stations licensed under Part 74 of the Commission's Rules by simplifying the renewal process. In addition, this action is intended to clarify the renewal process for interested members of the public.

III. Legal Basis

Authority for the actions proposed in this *Notice* may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303.

IV. Reporting, Recordkeeping, and Other Compliance Requirements

None.

V. Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule

None.

VI. Description, Potential Impact and Number of Small Entities Involved

Approximately 8,000 licensees of all sizes may be affected by the proposals contained in this *Notice*.

VII. Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives

If adopted, the proposals contained in this *Notice* would reduce administrative burdens on small entities.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: August 5, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Commonwealth Broadcast	8210-BH
of Northern California	C5-799
Licensee, Station KMZQ-FM	C12-161
2550 Fifth Ave.	C12-178
San Diego, CA 92103	C12-322
	C12-375

Dear Sir or Madam:

This letter constitutes a Notice of Apparent Liability for a forfeiture in the amount of twelve thousand, five hundred dollars ($12,500) pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and the Commission's Rules. This action is being taken by the Chief of the Mass Media Bureau pursuant to the delegation of authority in Section 0.283 of the Commission's Rules.

On November 18, 1991, the Commission sent you a letter of inquiry concerning allegations that Station KMZQ-FM had aired commercials promoting lottery activities, in possible violation of 18 U.S.C. Section 1304 and Section 73.1211 of the Commission's Rules. Specifically, we stated that we had received information alleging that your station broadcast commercials for a "Car-A-Day in May" promotion conducted at the Palace Station Hotel and Casino. Our concern focused on whether non-purchasing entrants were able to participate on a reasonably equal footing with persons who gained additional entries by providing consideration. Further, our inquiry noted that the subject commercial apparently contained a jingle with the phrase: "The Palace Station, play the favorite." This raised questions as to whether the commercial promoted lottery activities that are conducted at the Palace Station Hotel and Casino.

Your December 11, 1991, response acknowledged that you broadcast the subject commercial between April 30, 1991, and May 31, 1991. You also provided a transcript of the commercial and the rules for the promotion, as well as a copy of the Las Vegas Review Journal's tenth annual "Best of Las Vegas poll," published March 3, 1991, in Las Vegas, NV. You state that the phrase, "The Palace Station, play the favorite" does not refer to any particular gambling game or to gambling in general, but, rather, to the fact that the Palace Station won in ten different categories in the Las Vegas Review Journal's poll, ranging from best seafood restaurant to best slots. In the context of discussing the poll to which you refer, the subject phrase could be interpreted as you say it should be. However, we find that the phrase "The Palace Station, play the favorite," as broadcast in the subject commercial, promotes ongoing lottery activities at the Palace Station, despite your explanation.

You state a belief that the subject promotion is identical to a "Car-A-Day in May" promotion that was run in 1990. The 1990 "Car-A-Day in May" promotion was the subject of a Commission declaratory ruling which found the event to be a lottery. *See Letter to Rolla Cleaver* (Mass Media Bureau, July 31, 1991). You explain that you were not aware of the earlier declaratory ruling until after you received the letter of inquiry concerning the 1991 "Car-A-Day in May" promotion.

The Car-A-Day in May promotion, as described in the rules that you provided, awarded a car each day in May to a winner whose entry had been randomly selected. Entries for the drawing could be obtained in two ways. Non-purchasers could obtain one free entry per day, which was available to anyone, 21 years or older, who presented identification with a Social Security number. Purchasers were entitled to one additional entry for each increment of $25.00 in a jackpot won on a nickel, quarter, half-dollar or dollar slot machine, for each increment of $125.00 won on any $5.00 machine, or each increment of $625.00 won on any $25.00 machine.

As your response and the rules that you provided demonstrate, the promotion that is the subject of our present investigation differs from the promotion that was the subject of our previous declaratory ruling in one respect. In the earlier promotion additional entries were distributed periodically every day by Palace Station employees throughout the hotel, casino and restaurant areas, at random, whether or not the guest was playing, eating or staying at the Palace Station, while the subject promotion provides no such means of entry.

You offer two reasons to support your belief that the subject promotion is not a lottery. First, you state a belief that because the promotion allowed entry by non-purchasing individuals, the element of consideration was eliminated. Second, you state a belief that the event was not a lottery because other stations in your area had broadcast advertisements for the same or a similar promotion.

A lottery is a scheme containing the elements of prize, chance and consideration. If one of these elements is missing, the scheme does not meet the lottery definition. Here, the elements of prize and chance are clearly present. Our analysis must focus on the presence or absence of "consideration" in light of your argument that non-purchasers had a reasonably equal chance to participate.

Promotions involving questions of whether purchasers and non-purchasers participated in a lottery on sufficiently equal footing so as to eliminate consideration have been expressly addressed by the Commission. *See Taft Broadcasting Co*, 18 FCC 2d 186 (1969) and *Public Notice Concerning Lotteries and Sales Promotions*, 18 FCC 2d 52 (1969). With respect to the acceptable method of conducting such promotions, we stated in *Taft*:

> If persons may participate in the scheme "free of charge," if free chances are made available to them, then the element of consideration is not present and the scheme does not constitute a lottery within the meaning of Section 1304. However, to thereby eliminate the element of consideration necessary to support a lottery finding, the free chances must be reasonably equally available to all participants in the

> contest. Nonpurchasing contestants must be able to obtain chances *in the same places, at the same times, and in the same number* as purchasing contestants, in a setting that does not otherwise encourage a purchase. 18 FCC 2d at 189. (Emphasis added).

In the promotion at issue here, you contend that the "reasonably equally available" test was satisfied despite the additional chances accorded purchasers. You have not demonstrated that reasonable parity among purchasers and non-purchasers existed in the casino promotion that you aired. You have submitted no data to establish the number of entry chances which the average "purchaser" (*i.e.*, winner of the slot machine jackpots that provided players with additional entries) would have been able to submit per day by virtue of playing the qualifying games. We are unable to conclude, therefore, that the free entry opportunities made available in the subject casino games afforded non-players a sufficiently equivalent chance to win so as to remove the element of consideration and render the promotions not lotteries.

Your belief that the subject promotion is not a lottery because other broadcast stations promoted it is irrelevant. Your liability for violating any Commission Rule, or statute over which the Commission has jurisdiction, will remain, and will not be diminished, if other stations have committed the same infraction. Accordingly, both the promotion of the "Car-A-Day in May" event, as well as the promotion of ongoing lottery activities at the Palace Station with the phrase "The Palace Station, play the favorite" appear to have violated the Commission's anti-lottery proscriptions.

Thus, it appears that Station KMZQ-FM willfully and repeatedly violated 18 U.S.C. Section 1304 and 47 C.F.R. Section 73.1211 from April 30, 1991, until May 31, 1991. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Commonwealth Broadcast of Northern California is hereby advised of its apparent liablity for a forfeiture of twelve thousand, five hundred dollars ($12,500).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our recently adopted *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*. Under these standards, $6,250 is the base forfeiture for a lottery violation. Because the violation was repeated, the forfeiture amount is increased and the total forfeiture amount is twelve thousand, five hundred dollars ($12,500).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: August 5, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Valley	8210-BH
Broadcasting	C2-424
Company	C3-63
Licensee, Station KVBC	C3-633
1500 Foremaster Lane	C6-790
Las Vegas, NV 89101	C7-333

Dear Sir or Madam:

This letter constitutes a Notice of Apparent Liability for a forfeiture in the amount of twelve thousand, five hundred dollars ($12,500) pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and Section 73.1211 of the Commission's Rules, 47 C.F.R. Section 73.1211. This action is being taken by the Chief of the Mass Media Bureau pursuant to the delegation of authority in Section 0.283 of the Commission's Rules.

BACKGROUND

On June 6, 1991, the Commission sent you a letter of inquiry concerning information it received alleging that KVBC had broadcast advertisements for promotions conducted by the Las Vegas Club Hotel and Casino, the Riviera Hotel and Casino, the Aladdin Hotel and Casino, the Showboat Hotel, Casino, and Bowling Center, and Mahoney's Silver Nugget. On July 10, 1991, you responded to our inquiry,[1] acknowledging that you had broadcast commercials for the five establishments named above.

In your response to our letter of inquiry, you argue that, in your opinion, none of the subject promotions were lotteries. You assert that Commission rulings in prior cases support your position that non-purchasers in the subject promotions were on an equal footing with purchasers, thereby eliminating the element of consideration.

A lottery is a scheme containing the elements of prize, chance and consideration. If one of these elements is missing, the scheme does not meet the lottery definition. Promotions involving questions of whether purchasers and non-purchasers participated in a lottery on sufficiently equal footing so as to eliminate consideration have been expressly addressed by the Commission. *See Taft Broadcasting Co*, 18 FCC 2d 186 (1969) and *Public Notice Concerning Lotteries and Sales Promotions*, 18 FCC 2d 52 (1969). Concerning the acceptable method of announcing such promotions, we stated in the *Public Notice*:

> Any announcement of a promotional scheme which depends upon the reasonably equal availability of free chances should adequately describe the availability of such free chances and the locations, times, and manner, in which they may be obtained. Such cryptic messages as no purchase necessary or nothing to buy do not meet this requirement. 18 FCC 2d at 53.

With respect to the acceptable method of conducting such promotions, we stated in *Taft*:

> If persons may participate in the scheme "free of charge," if free chances are made available to them, then the element of consideration is not present and the scheme does not constitute a lottery within the meaning of Section 1304. However, to thereby eliminate the element of consideration necessary to support a lottery finding, the free chances must be reasonably equally available to all participants in the contest. Nonpurchasing contestants must be able to obtain chances *in the same places, at the same times, and in the same number* as purchasing contestants, in a setting that does not otherwise encourage a purchase. 18 FCC 2d at 189. (Emphasis added).

In each of the promotions at issue here, you contend that the "reasonably equally available" test was satisfied even though additional chances were accorded to purchasers. In this regard, you rely on the staff decision in *Letter to Michael C. Gilbert* (Broadcast Bureau, March 10, 1981). That decision involved a promotion for Pepsi-Cola in which every bottle of Pepsi-Cola contained an entry, yet free entries, obtained from the local Pepsi-Cola bottler or by written request, were limited to six a day. Despite the fact that a purchaser could buy more than six bottles of Pepsi-Cola a day, the staff found that reasonably equal availability existed and that the promotion was not a lottery. Thus, while absolute equality between purchasers and non-purchasers did not exist, the decision concluded that it was reasonable to assume that the average purchaser would not buy and consume more than six Pepsi-Colas per day and that reasonably equal availability was therefore achieved when six free entries per day were made available to non-purchasers.

By contrast, you have not demonstrated that an analogous reasonable parity among purchasers and non-purchasers existed in the casino promotions you aired. As detailed below, non-purchasers seeking to participate in those promotions were only permitted to submit a limited number of entries each day. By contrast, you have submitted no data to establish the number of entry chances which the average "purchaser" (*i.e.*, sports book, keno and blackjack player) would have been allowed to submit per day by virtue of playing the qualifying games. Your analysis instead compared only the number of free tickets available to the predicted number of "purchased" tickets that would be won. We are unable to conclude, therefore, that the free entry opportunities made available in the subject casino games afforded non-players a sufficiently equivalent chance to win so as to remove the element of consideration and render the promotions not lotteries. Moreover, your broadcasts concerning the subject promotions also failed to describe adequately the availability of free chances and the locations, times and manner in which they may be obtained. Such information must be included to exempt promotions from classification as lotteries for purposes of 18 U.S.C Section 1304 and Section 73.1211 of our rules.

You also present comparisons with what you term "analagous promotions" that you assert have been widely promoted on broadcast stations. However, none of the

promotions that you cite for comparative puposes have been the subject of Commission determinations as to whether or not they were lotteries. Accordingly, these comparisons are not relevant to our determination as to whether any of the present promotions are lotteries.[2]

DISCUSSION

Las Vegas Club, Hotel and Casino (Las Vegas Club)

You state that you broadcast commercials for the "30th Anniversary $1,000 a Night Cash Giveaway" promotion from February 8, 1991 through February 14, 1991. The records that you submitted indicate that these commercials were broadcast seven times in that period. According to the rules for the contest that you supplied, purchasers and non-purchasers alike were entitled to submit one free entry per day; those entries were available at the club. However, bonus entries could also be obtained by players winning certain casino games, including one bonus entry for each Sports Book payout of $25.00 or more. There apparently was no "per-day" limitation on the number of such bonus entries that a player could submit in the contest.

Each entrant (player or non-player) could also submit up to one free bonus entry coupon per day. These free bonus coupons were distributed by a mass mailing to 5,000 Las Vegas residents and by the publication of three weekday ads and three Sunday ads containing bonus coupons in the *Las Vegas Review Journal*. None of the free bonus entry coupons were available within the Las Vegas Club, other than in the limited number of copies of the *Las Vegas Review Journal* that may have been on sale at the Las Vegas Club on the six days that free bonus entry coupons were contained in that newspaper. According to a videotape of the commercial and the script of the commercial that you submitted, the means of obtaining these free bonus entry coupons was not described in the television commercial.

Using information that the Las Vegas Club provided you about the total number of free entries and the anticipated number of paid for entries available for this promotion, you did your own calculations to compare the two groups. Your statistical analysis led you to the conclusion that equal availablity existed in this promotion. Your analysis, however, fails to compare the advantage a "purchasing" individual (*i.e.*, a person receiving payouts of $25.00 or more at the Sports Book) would have compared to a "non-purchasing" individual. In particular, although you describe the availability of various entry coupons, you have not shown how many "purchaser" bonus entries a purchaser would have actually been entitled to submit as compared to the two entries (one free entry plus one bonus free entry) that a non-purchaser was limited to submitting each day.[3]

Moreover, the commercials that you broadcast for the Las Vegas Club's "30th Anniversary $1,000 a Night Cash Giveaway" promotion did not describe the means by which bonus free entries could be obtained, that is, through mailings and newspapers. Those entries also were not available at the same places, times or quantities as the bonus entries won by winners of certain casino games. Accordingly, we find that the element of consideration was present, and conclude that the promotion was a lottery under our precedents.

Riviera Hotel and Casino (Riviera)

You state that you broadcast commercials for the Riviera's "Grand Opening Celebration" at various times from March 30, 1990, through April 28, 1990. The records that you submitted indicate that these commercials aired approximately 60 times. According to the rules for the contest, one free entry per person per day was available at the Riviera. Additionally, free entries were distributed periodically on a daily basis at random to guests of the Riviera, whether or not a guest was playing, eating, or staying at the Riviera. Bonus entries could be obtained by winners playing certain casino games and a bonus entry was given to anyone buying two tickets to "SPLASH," which appears to be a local show.[4]

You state that you had informal discussions with Commission staff concerning the propriety of broadcasting commercials for this promotion and that, as a result of those discussions, you thought that the promotion was a suitable non-lottery promotion because it included the random distribution of free tickets throughout the hotel and casino. While the Riviera commercials were running on your station the Palace Station Hotel and Casino placed an order to air a spot on your station for their "Car-A-Day in May" promotion, which also included the random distribution of free tickets. However, before you began to broadcast advertisements for the Palace Station promotion, you state that you were advised by Commission staff that previous discussions that you had as to the suitability of promotions structured such as the proposed Car-A-Day promotion were under question and that it was possible that the Commission would take the position that merely requiring participants to be present in the establishment to obtain free contest entries might be found to constitute consideration. We note that you continued to broadcast commercials for the Riviera promotion for two days after being advised of the possible problem with the Car-A-Day promotion, up until the day before the Riviera promotion ended.

You explain that you cancelled the order for the Car-A-Day commercials before they aired and sought a declaratory ruling concerning those commercials. When the Commission issued a ruling on the "Car-a-Day in May" promotion, that ruling found that requiring participants to be present for the distribution of tickets at unspecified times constituted consideration, that equal availability did not exist between purchasers and non-purchasers, and that the promotion was, accordingly, a lottery. *See, Letter to Rolla Cleaver* (Mass Media Bureau, July 31, 1990).

Since, in the Riviera's "Grand Opening Celebration" promotion only one free entry per day was available, to purchasers as well as non-purchasers, but purchasers had several other means to obtain additional entries, we find the consideration element to be present and, thus, consider the promotion to have been a lottery.

Aladdin Hotel and Casino (Aladdin)

You state that you broadcast commercials for the Aladdin's "$200,000 Big Bucks Blowout" at various times from November 1, 1990, through November 30, 1990. The records that you submitted demonstrate that these commercials aired approximately 55 times. You describe efforts that you made to work with agents of the Aladdin to make the promotion suitable for broadcast advertising. You explain that the Aladdin provided you with confidential information about the number of entries being distributed pursuant to purchase in the keno, as well as other

portions, of this promotion. Although this information indicated that only 30% to 40% of the entries in the keno portion of this promotion would be free, you analysed the equality of availability between purchasers and non-purchasers by combining all free entries for all portions of this promotion with all purchased entries for all portions of this promotion. You then compared these totals with the totals in the Pepsi-Cola promotion, cited above, and concluded that the Aladdin promotion offered reasonably equal availability to purchasing and non-purchasing participants and was thus appropriate to be broadcast advertised.

As your letter and the rules for this contest indicate, entries for the cash drawing were entirely free, with participants entitled to submit one entry per person per day. However, the "keno" portion of this promotion gave one free ticket to all individuals and greater rewards to players making certain bets. Accordingly, purchasers had a greater chance of winning than non-purchasers. The commercials that you broadcast for this promotion also failed to describe the means for obtaining free tickets. Accordingly, the element of consideration, as well as the elements of chance and prize were present, and the promotion was a lottery.

Showboat Hotel, Casino & Bowling Center (Showboat)

You state that you broadcast commercials for the Showboat's "$1,000 a month 'til the Year 2000" promotion from January 4, 1991, through January 25, 1991. The records that you submitted indicate that these commercials aired approximately 35 times. According to the rules for the contest that you submitted, one free entry per day per person was available at the Showboat. Free entry coupons were also distributed by mass mailings and newspaper ads. However, only one free entry coupon obtained from any of these sources could be submitted per day. By contrast, bonus entries also could be submitted by winners playing certain casino games, including one bonus entry for each Sports Book or Race Book payout of $25.00 or more, and one bonus entry to each player with a bet on a hand when the dealer at a table got blackjack, without any "per-day" limitation.

You explain that the Showboat provided you with confidential information about the number of free entries and the number of entries distributed pursuant to purchase in this promotion. You compared the total number of entries available to these two groups, contrasted those figures to the facts of the Pepsi-Cola promotion, cited above, and concluded that the Showboat promotion was acceptable for broadcast. However, your analysis did not compare the advantage that a purchasing individual, *i.e.*, a person who played blackjack for a typical period of time (and who could also get the "non-bonus" free entries) would have over a non-purchasing individual with respect to the number of entries each would have likely submitted per day.

The commercials that you broadcast for the Showboat's "$1.000 a month 'til the year 2000" promotion also share the problem cited for the Aladdin promotion, in that they did not describe the means by which free entries could be obtained. Furthermore, the free entries were not available to non-purchasers at the same places, times or quantities as the bonus entries available to casino game players. Accordingly, the element of consideration, as well as the elements of chance and prize were present, and the promotion was a lottery.

Mahoney's Silver Nugget (Mahoney's)

You state that you broadcast commercials for Mahoney's "Valentine's Day" promotion from February 6, 1991, through February 14, 1991. The records that you submitted indicate that these commercials aired approximately 20 times. According to the rules for this promotion, one free ticket per person per day was available at Mahoney's. Free tickets were also mailed to residents of the Las Vegas Valley and additional free tickets were distributed in one Sunday edition of the *Review Journal* newspaper. Additional tickets were given to winners of certain casino games, including winners of a $10.00 jackpot on any slot machine, video or live keno game, players dealt blackjack with a $10.00 minimum bet and single winners in bingo. Five tickets had to be redeemed for one Silver Ticket, which was the only ticket that could be used to enter the promotion.

You explain that Mahoney's provided you with confidential information on the number of paid entries that it had awarded during the first eleven days of the promotion. From that number, you calculated the total number of paid entries expected to be awarded for the entire promotion, and compared that number to the total number of free entries that would be available. Again, your analysis failed to compare the advantage that a purchasing individual, *e.g.*, a person who played a slot machine for a typical period of time (and who could also get free tickets) would have over a non-purchasing individual with respect to the number of tickets each would likely have obtained each day.

Additionally, the fact that this promotion required five tickets in order to make one entry for the drawing appears to have worked to disadvantage non-purchasers, particularly if they were not one of the 9,500 residents to be mailed a free ticket, or if they were not in Las Vegas on the one day that tickets were available in the *Review Journal*. Such persons could obtain the Silver Ticket necessary to enter the promotion only by going to Mahoney's on five separate days. Furthermore, the commercial that you broadcast failed to describe adequately the means of obtaining free tickets for this promotion. Accordingly, the element of consideration, as well as the elements of chance and prize were present, and the promotion was a lottery.

CONCLUSION

Thus, it appears that Station KVBC willfully and repeatedly violated 18 U.S.C. Section 1304 and 47 C.F.R. Section 73.1211 from February 6, 1991, until February 14, 1991 (Las Vegas Club promotion and Mahoney's promotion); from March 30, 1990, until April 28, 1990 (Riviera promotion); from November 1, 1990, until November 30, 1990 (Aladdin promotion); and from January 4, 1991, until January 25, 1991 (Showboat promotion). Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Valley Broadcasting Company is hereby advised of its apparent liablity for a forfeiture of twelve thousand, five hundred dollars ($12,500).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our recently adopted *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied* FCC 92-212 (released June 4, 1992). Under these standards, $6,250 is the base forfeiture for a

lottery violation. Because the violation was repeated, the forfeiture amount is increased and the total forfeiture amount is twelve thousand, five hundred dollars ($12,500).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart,
Chief, Mass Media Bureau

FOOTNOTES

[1] Upon timely request from KVBC's counsel, the due date for KVBC's response was extended to July 10, 1991.

[2] You have also asserted that the subject promotions do not fail for lack of specificity, a condition cited in a previous Mass Media Bureau declaratory opinion that found a promotion conducted at a casino to be a lottery. *See Letter to Rolla Cleaver* (Mass Media Bureau, July 31, 1990). However, as noted below, advertisements for the subject promotions lacked specificity as to how non-purchasers could participate. Since we find that these promotions were lotteries because they, in fact, lacked equal availability we need not address this aspect at length.

[3] This case is thus readily distinguishable from the Pepsi-Cola decision on which you rely. *See* page 2, *supra*. In that case, we held that, for all practical purposes, non-purchasers participating in the promotion were on equal footing with purchasers, since both groups were unlikely to submit more than six entries per day (which was the limit imposed on non-purchasers). Here, by contrast, non-players were limited to a maximum of two entries per day, yet you have provided no data to indicate that, for all practical purposes, players would be similarly restricted in the number of entries they could submit. The issue thus is not how many entry coupons were *distributed* (or made available) to non-purchasers, but how many entries they could *submit* each day as compared to purchasers.

[4] We note that the set of rules for this promotion that you provided with your response did not state that bonus entries were given to anyone buying two tickets to "SPLASH." However, the Commission has been provided with two other sets of rules for the Riviera promotion that included this feature. In any event, since bonus tickets were given to winners of certain casino games, according to all three sets of rules, this factor is not of decisional significance.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: August 5, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

WTMJ, Inc.	8210-BH
Licensee, Station KTNV	C2-424
3355 S. Valley View Blvd	C3-63
Las Vegas, NV 89102	C3-633
	C6-765
	C7-288

Dear Sir or Madam:

This letter constitutes a Notice of Apparent Liability for a forfeiture in the amount of twelve thousand, five hundred dollars ($12,500) pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and Section 73.1211 of the Commission's Rules, 47 C.F.R. Section 73.1211. This action is being taken by the Chief of the Mass Media Bureau pursuant to the delegation of authority in Section 0.283 of the Commission's Rules.

BACKGROUND

On June 6, 1991, the Commission sent you a letter of inquiry concerning information it received alleging that Station KTNV had broadcast advertisements for promotions conducted by the Las Vegas Club Hotel and Casino, the Showboat Hotel, Casino and Bowling Center, the Aladdin Hotel and Casino, Mahoney's Silver Nugget, and the Riviera Hotel and Casino. On July 8, 1991, you responded to our inquiry,[1] acknowledging that you had broadcast commercials for three of the five establishments named above, but stating that you did not broadcast any commercials for the "Valentine's Day $1,400 Free Cash Drawing" that was conducted at Mahoney's Silver Nugget or the "$300,000 Video Slot Giveaway" that was conducted at the Las Vegas Club Hotel and Casino.

In your response to our letter of inquiry, you argue that, in your opinion, none of the subject promotions were lotteries because consideration was not present in any of them. You state that KTNV takes seriously its obligations to comply with the statute and Commission Rule prohibiting the broadcast of lottery information, and you describe the system of reviewing commercials that are submitted to your station in order to avoid broadcasting commercials that promote lotteries. You assert that KTNV has rejected many commercials for Las Vegas establishments where it determined that lotteries were being advertised.

A lottery is a scheme containing the elements of prize, chance and consideration. If one of these elements is missing, the scheme does not meet the lottery definition. Promotions involving questions of whether purchasers and non-purchasers participated in a lottery on sufficiently equal footing so as to eliminate consideration have been expressly addressed by the Commission. *See Taft Broadcasting Co*, 18 FCC 2d 186 (1969) and *Public Notice Concerning Lotteries and Sales Promotions*, 18 FCC 2d 52 (1969). Concerning the acceptable method of announcing such promotions, we stated in the *Public Notice*:

> Any announcement of a promotional scheme which depends upon the reasonably equal availability of free chances should adequately describe the availability of such free chances and the locations, times, and manner, in which they may be obtained. Such cryptic messages as no purchase necessary or nothing to buy do not meet this requirement. 18 FCC 2d at 53.

With respect to the acceptable method of conducting such promotions, we stated in *Taft*:

> If persons may participate in the scheme "free of charge," if free chances are made available to them, then the element of consideration is not present and the scheme does not constitute a lottery within the meaning of Section 1304. However, to thereby eliminate the element of consideration necessary to support a lottery finding, the free chances must be reasonably equally available to all participants in the contest. Nonpurchasing contestants must be able to obtain chances *in the same places, at the same times, and in the same number* as purchasing contestants, in a setting that does not otherwise encourage a purchase. 18 FCC 2d at 189. (Emphasis added).

DISCUSSION

Riviera Hotel and Casino (Riviera)

You state that you broadcast commercials for the Riviera's "Grand Opening Celebration" approximately forty times from April 1, 1990, through April 29, 1990. According to the rules for the contest that the Commission has obtained, one free entry per person per day was available at the Riviera. Additionally, free entries were distributed periodically on a daily basis at random to guests of the Riviera, whether or not a guest was playing, eating, or staying at the Riviera. In addition, bonus entries could be obtained by winners playing certain casino games and a bonus entry was also given to anyone buying two tickets to "SPLASH," which appears to be a local show.

You state that you determined that no consideration was present in this promotion because (1) the easy availability of free tickets provided an alternative to bonus tickets potentially available to casino game players; (2) there was no requirement for individuals to pay in order to have a chance to win; and (3) individuals were not required to remain at the casino for any period of time in order to obtain a ticket.

You state that your determination was consistent with advice that a representative of KVBC-TV gave you concerning the Riviera promotion. You state that in late March 1990, this representative told you that she had received a verbal opinion from Commission staff that the Riviera promotion would not be considered to be a lottery. However, you say, in May 1990, you learned from that KVBC-TV representative that Commission staff had verbally advised her that a new promotion by the Palace

Station Hotel and Casino, "Car-A-Day in May," a promotion with rules similar to the Riviera contest, would not be lawful. As you explain, when the representative of KVBC-TV requested a written opinion on the legality of the Palace Station promotion, the Commission issued a ruling that broadcast of information about the Palace Station promotion would be unlawful. *See Letter to Rolla Cleaver* (Mass Media Bureau, July 31, 1990).

Your determination that consideration was not present in the Riviera promotion because free tickets were available failed to correctly apply the law governing the requirements of equal availability, as cited above in *Taft Broadcasting Co.* In the Riviera's "Grand Opening Celebration" promotion only one free entry per day was available to purchasers as well as non-purchasers, but purchasers had several other means to obtain and submit additional entries. Accordingly, since non-purchasers were not on equal footing with purchasers, we find the consideration element to be present and consider the promotion to have been a lottery.

Whatever representations may have been made by employees of KVBC-TV concerning asserted verbal opinions from Commission staff about the Riviera promotion, they were not, and could not have been, dispositive or binding on the Commission. As to any reliance you had on the statement from a KVBC-TV representative that she had received a verbal opinion that the Riviera promotion was not a lottery, such reliance was placed at your own risk. As it happens, when the Commission was finally presented with the settled details of a similar promotion and a formal ruling was requested, the staff found that equal availability did not exist between purchasers and non-purchasers, and that the promotion was, accordingly, a lottery. *See Letter to Rolla Cleaver* (Mass Media Bureau, July 31, 1990). The staff was never asked for a written ruling on the promotions at issue in this case.

Aladdin Hotel and Casino (Aladdin)

You state that you broadcast approximately twenty commercials for the Aladdin's "$200,000 Big Bucks Blowout" from October 15, 1990, through October 23, 1990. You claim that the Aladdin provided you with a set of rules for this promotion which stated that free tickets for the daily prize drawings would be available at several locations in the Aladdin, but that these rules did not provide that additional tickets would be available to persons who played various casino games. You state that when you learned, midway through the commercial schedule, that keno and craps players were receiving extra tickets for the prize drawings in this promotion, you suspended broadcasts of these commercials. When you learned that the Aladdin would not stop providing these additional entries to keno and craps players, you assert, you canceled the schedule for these commercials.

You have not provided the Commission any printed rules for the Aladdin promotion that omit the fact that keno players could receive additional entries in this promotion. On the other hand, the Commission has received three copies of the rules to this contest from three separate sources, and all three copies of the rules clearly state that the "keno" portion of this promotion gave "double tickets to patrons playing 10 game multi's (keno games) or more" with a minimum $2.00 bet, while nonpurchasing players could get a maximum of one free entry. Accordingly, purchasers had a greater chance of winning than non-purchasers. And while you failed to provide tapes or transcripts of the commercials that you broadcast for this promotion, copies of commercials for this promotion obtained from other sources indicate that the commercials that you broadcast for this promotion also failed to describe the means for obtaining free tickets, as required by our *Public Notice*, cited above. Accordingly, the element of consideration, as well as the elements of chance and prize were present, and the promotion was a lottery.

Showboat Hotel, Casino & Bowling Center (Showboat)

You state that you broadcast approximately forty commercials for the Showboat's "$1,000 a month 'til the Year 2000" promotion from January 1, 1991, through January 28, 1991. According to the rules for the contest that the Commission has obtained, one free entry per day per person was available at the Showboat. Free entry coupons were also distributed by mass mailings and newspaper ads. However, only one free entry coupon obtained from any of these sources could be submitted per day. By contrast, according to the contest rules obtained by the Commission, bonus entries also could be submitted by winners playing certain casino games, including one bonus entry for each Sports Book or Race Book payout of $25.00 or more, and one bonus entry to each player with a bet on a hand when the dealer at a table got blackjack, without any "per-day" limitation.

You state that coupons for free entries were mailed to 290,000 Las Vegas homes and appeared in ads in the Las Vegas Review daily newspaper, circulation 140,000. You state that, because there were a large total number of free entries being distributed you believed that consideration could not be present, despite the fact that additional tickets could be obtained by players at the casino. However, your analysis failed to compare the advantage that a purchasing individual, *i.e.*, a person who played blackjack for a typical period of time (and who could also get the "non-bonus" free entries) would have over a non-purchasing individual with respect to the number of entries each would have likely submitted per day. *See Notice of Apparent Liability to KLAS-TV, Las Vegas, NV*, (Mass Media Bureau, Released May 6, 1992).

According to copies of these commercials provided to the Commission, the commercials that you broadcast for the Showboat's "$1,000 a month 'til the year 2000" promotion also share the problem cited for the Aladdin promotion, in that they did not describe the means by which free entries could be obtained. Furthermore, the free entries were not available to non-purchasers at the same places, times or quantities as the bonus entries available to casino game players. Accordingly, the element of consideration, as well as the elements of chance and prize were present, and the promotion was a lottery.

CONCLUSION

Thus, it appears that Station KTNV willfully and repeatedly violated 18 U.S.C. Section 1304 and 47 C.F.R. Section 73.1211 from April 1, 1990, until April 29, 1990 (Riviera promotion); from October 15, 1990, until October 23, 1990 (Aladdin promotion); and from January 1, 1991, until January 28, 1991 (Showboat promotion). Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, WTMJ, Inc., is hereby advised of its apparent liablity for a forfeiture of twelve thousand, five hundred dollars ($12,500).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our recently adopted *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*. Under these standards, $6,250 is the base forfeiture for a lottery violation. Because the violation was repeated, the forfeiture amount is increased and the total forfeiture amount is twelve thousand, five hundred dollars ($12,500).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart,
Chief, Mass Media Bureau

FOOTNOTE

[1] Upon timely request from KTNV's counsel, the due date for KTNV's response was extended to July 10, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-349

In the Matter of

Amendment of Part 2 of the rules concerning the importation of radio frequency devices capable of causing harmful interference

ORDER ON RECONSIDERATION

Adopted: July 17, 1992; Released: August 5, 1992

By the Commission:

I. INTRODUCTION

1. We have before us three petitions for reconsideration or clarification of policies and rules we recently adopted concerning the importation of radio frequency (RF) devices capable of causing harmful interference.[1] For the reasons set forth below, we grant the requests to increase the number of devices allowed to be imported for test and evaluation purposes and clarify the scope of the related rules. We decline, however, to increase the number of devices allowed to be imported for trade show demonstrations purposes. We decline to create a blanket waiver procedure of those rules. We also decline to amend the policies regarding confidential treatment of Form 740 information, and reaffirm our decision to prohibit the importation of devices pending authorization.

II. BACKGROUND

2. The impetus for the Commission's proceeding was to update the rules covering the importation of RF devices capable of causing harmful interference, eliminate burdensome and duplicative government information filing requirements, facilitate the collection of required information through an electronic filing system administered by the U.S. Customs Service (Customs) and more closely match the Commission's rules with the separate requirements of the Telecommunications Trade Act of 1988, Public Law 100-418, 102 STAT. 1216 (1988), 19 U.S.C. Section 3101 *et seq*. The pertinent Commission rules are contained in Subpart K of Part 2. Their purpose is to keep devices which do not comply with the Commission's technical requirements from being distributed to the general public, thereby reducing the potential for harmful interference being caused to authorized radio communications. The rules generally require importers and consignees of RF devices to associate an FCC Form 740 with each RF device that is imported into the United States. The form requires the importer or consignee to determine and declare that the RF devices being imported comply with the Commission's technical requirements and also requires specific information about the devices, such as manufacturer and model number.

3. The information on Form 740 is largely duplicative of that collected by Customs. Customs had undertaken to automate its importation entry process and has offered to gather FCC information through its entry and entry summary processes, and to provide all Form 740 information to the Commission. In exchange, the Commission would eliminate the requirement for filing paper copies of Form 740 with either Customs or the Commission.

4. On July 25, 1989, the Commission adopted a Notice of Proposed Rule Making that proposed changes to the rules governing the importation of RF devices.[2] After consideration of the proposals, we adopted a *Report and Order* on May 1, 1991. In it, we concluded that conversion to an electronic system of filing Form 740 information would allow more efficient use of resources by both the government and the industry and amended many of the rules related to the importation of RF devices to satisfy the goals stated above. We also reconfirmed our policy of releasing Form 740 information to the public.

5. Three petitions for reconsideration or clarification[3] were filed following the release of our *Report and Order*. The petitioners request that we increase the number of devices allowed to be imported for test, evaluation or demonstration purposes and clarify the scope of the related rules. Petitioners also seek the implementation of a blanket waiver process of those rules. They further request a reexamination of our policy to make Form 740 information available for routine public inspection. Finally, petitioners ask that we reconsider our decision to prohibit importation of devices while a grant of authorization is pending.

III. DISCUSSION

A. Limitation on quantity of devices imported for testing.

6. *Petitions and comments*. The rules allow, among other things, certain devices to be imported in limited quantities -- without an equipment authorization -- for test, evaluation or demonstration purposes. 47 C.F.R. Sections

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[1] *See* Amendment of Part 2 of the rules concerning the importation of radio frequency devices capable of causing harmful interference, Gen. Docket No. 89-349; Report and Order, 6 FCC Rcd 3296 (1991) (hereinafter *Report and Order)*.

[2] Amendment of Part 2 of the rules concerning the importation of radio frequency devices capable of causing harmful interference: *Notice of Proposed Rule Making*, 4 FCC Rcd 6146 (1989) (hereinafter *NPRM)*.

[3] The petitioners are Apple Computer, Inc.; Matsushita Electric Corporation of America, Sony Corporation of America, Zenith Data Systems, Computer and Business Equipment Manufacturers Association (Joint Petitioners); Texas Instruments Incorporated. All of the petitions were filed on July 11, 1991. Comments were filed by Apple Computer, Inc., American Telephone and Telegraph Company, Memorex Telex Corporation, Motorola Inc. and Tandy Corporation. Reply comments were filed by Apple Computer, Inc., International Business Machines, Inc., Matsushita Electric Corporation of America, Sony Corporation of America, Tandy Corporation, Texas Instruments Incorporated, Zenith Data Systems, Computer and Business Equipment Manufacturers Association (Joint Respondents) and by Memorex Telex Corporation.

2.1204(a)(3) and (a)(4). In the *Report and Order*, we defined "limited quantities" to be ten or fewer devices unless prior written approval is received from the Field Operations Bureau's Enforcement Division. Texas Instruments asks us to increase that number to at least 200 units per product generation.[4] Apple asks us to "raise significantly" this limit indicating that "well in excess of 100" devices are routinely needed.[5] The Joint Petitioners similarly request that we increase the limit and also seek clarification of the scope of the rules, including whether the limit refers to the number of units of a model or the number of models, including sequential prototypes.[6] Comments by Motorola indicate that, while more than ten devices may be required under the limited quantities provisions, the revised number should apply to "the *aggregate* number of units of a given model imported prior to equipment authorization grant, regardless of whether the units are imported in one or multiple shipments."[7] AT&T comments support the requests by the petitioners that the limited quantity be increased well above the limit of ten devices.[8] Comments from Memorex also support the requests for an increased limit.[9] Tandy Corporation opposes an increase from ten to seventy devices (suggested by the Joint Petitioners) in favor of a limit of 200 devices.[10] In reply comments, Memorex supports an increase in the number of devices allowed under the limited quantities provision.[11] Further support for increasing the limited quantity definition to 200 units is provided in a "consolidated reply filed by Apple, IBM, Matsushita, Sony, Tandy, Texas Instruments, Zenith and CBEMA.[12] Comments concerning devices for display at trade shows were limited to requests for clarification of the definition of "limited quantities" for this purpose. There were no comments indicating that a large number of devices are needed for trade shows.

7. *Decision.* We agree with petitioners that the number of devices allowed to be imported for test and evaluation purposes should be increased and accordingly amend the rules to allow for the importation of 200 or fewer devices for such purposes. Our experience with waiver requests since the implementation of the rules supports the parties' assertions that 200 is a more appropriate number. Approximately 85% of the waiver requests have requested importation of fewer than 200 devices. We also clarify the scope of the rules to make clear that limited quantity of devices refers to separate models and separate generations of a particular model as separate devices. As originally intended in the rules, the limited quantity of devices is an aggregate limit for the separate devices imported. Our original intent is preserved in the rules as revised. We also agree with the Joint Petitioners that importing the devices to determine suitability for marketing as provided in Section 2.1204(a)(3) includes non-FCC testing such as "UL" review. The scope of the rules was intended to allow up to ten devices for test and evaluation and up to ten devices for trade show demonstration purposes. While we agree that more than ten devices may be needed for test and evaluation, we will retain the originally intended limit of ten devices for demonstration at trade shows. We believe such amendments will help ensure the quality and performance of RF devices before they are marketed. We will continue to entertain requests for waiver when good cause is shown and intend to continue to act on those requests on an expedited basis.

B. Blanket waiver.

8. *Petitions and comments.* The Joint Petitioners request that we establish a procedure for a blanket waiver whereby an importer can import on an ongoing basis more than the limited number of devices without prior Commission approval. According to the Petitioners, this blanket waiver provision is needed in order to facilitate the importation of more than seventy devices and would be granted only upon sufficient showing of need. In a consolidated reply, additional commenters joined to support the request for blanket waiver provisions.[13]

9. *Decision.* We decline to implement a blanket waiver process. We believe that by increasing the number of devices allowed to be imported for test and evaluation purposes, we have reached the correct balance between protecting against harmful interference to authorized devices and allowing importers the flexibility to test and demonstrate their products before marketing them, and that a blanket waiver is unnecessary.

C. Confidential treatment.

10. *Petitions and comments.* Commenters to the *NPRM* expressed a concern that the change from paper to electronic filing would allow for easier access to Form 740 information and thereby to potentially competitively sensitive information and also argued that, because Customs does not make information collected by it routinely available, neither should the Commission. In the *Report and Order*, we stated our intention to continue our practice of making all Form 740 information available to the public, and stated that an importer seeking confidential treatment could apply for protection under Section 0.459 of the Commission's rules.[14] Texas Instruments requests that we implement adequate safeguards to ensure confidential treatment of competitively sensitive information, and asks us to coordinate with Customs to develop software to (1) permit companies to request such treatment electronically; (2) indicate electronically when such treatment has been requested; and (3) restrict public access to confidential information contained in electronic or other form. Apple asks that we afford waiver requests automatic confidential treatment, even after grant, rather than requiring a separate request under Section 0.459. In its opposition, Tandy included comments to support the request that importation declaration information as well as waiver requests be withheld from routine public access.[15]

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[4] Texas Instruments Petition for Partial Recon. at para. 5.
[5] Apple Computer, Inc. petition at page 4.
[6] Joint Petitioners petition at page 2.
[7] Motorola, Inc. comments at para. 11.
[8] AT&T comments at page 2.
[9] Memorex comments at para 1.
[10] Tandy opposition at page 3.
[11] Memorex reply comments at para 1.
[12] Consolidated reply comments at page 3.
[13] Consolidated reply comments at page 4.
[14] 47 C.F.R. § 0.459 provides that certain information on file with the Commission may be protected, upon a party's request, from public disclosure.
[15] Tandy opposition at page 8.

11. *Decision.* We are unpersuaded that we should alter our policy of making the information collected routinely available. The Commission's rules provide a mechanism for requesting that specific material or information submitted to the Commission not be made routinely available for public inspection. Section 0.459 of our rules requires that a written request be filed with the Commission. If such a request is granted, the material or information will be withheld from public inspection.[16] FCC data systems will be programed to properly protect any such information. While we will look into the possibility of filing Section 0.459 requests electronically, at present such requests must be made in writing to the Commission pursuant to the rule requirements. We also decline to treat waiver requests differently from Form 740 information.

D. Importation while grant is pending.

12. *Petition.* In the *Report and Order,* we amended the rules to prohibit the importation of devices while a grant of equipment authorization is pending, despite arguments by commenters to the *NPRM* that requiring importers to wait for the authorization will give them an unfair competitive disadvantage. In its Petition, Apple states that the rule change was inappropriate and puts devices manufactured off-shore at a severe handicap over domestically manufactured devices. It seeks reinstatement of the rule allowing such importation or seeks clarification that devices subject to pending authorization may be imported into a U.S. foreign trade zone.[17]

13. *Decision.* We affirm our decision to prohibit importation of devices pending authorization. As stated in the *Report and Order,* the rule change was necessary to protect the public from distribution of unauthorized equipment. We conclude, therefore, that the entry of such devices should be denied until proper authorization has been obtained. The amended rules set forth in the *Report and Order* do not prevent importers from shipping goods to the United States under appropriate bond or other control arrangement acceptable to Customs, nor do they prevent Customs from imposing bond requirements for Customs' own enforcement purposes. Shipments of goods under Customs imposed bonds or through properly controlled areas approved by Customs (which may include foreign trade zones) is consistent with the Commission's rules so long as the goods are not released for consumption and do not enter the commerce of the United States. New section 2.1201(c) is added to the rules to clarify this issue.

IV. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 302(a) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 302(a) that the petitions for reconsideration, partial reconsideration, and/or clarification filed in this proceeding ARE GRANTED to the extent provided herein and otherwise ARE DENIED; and the rules ARE AMENDED as set forth in the attached Appendix B, effective 30 days after publication in the *Federal Register.*

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Petitions

Apple Computer, Inc.

Matsushita Electric Corporation of America, Sony Corporation of America, Zenith Data Systems, Computer and Business Equipment Manufacturers Association (Joint Petitioners)

Texas Instruments Incorporated

Oppositions and Comments

Apple Computer, Inc.

American Telephone and Telegraph Company

Memorex Telex Corporation

Motorola Inc.

Tandy Corporation

Reply Comments

Apple Computer, Inc., International Business Machines, Inc., Matsushita Electric Corporation of America, Sony Corporation of America, Tandy Corporation, Texas Instruments Incorporated, Zenith Data Systems, Computer and Business Equipment Manufacturers Association (Joint Respondents)

Memorex Telex Corporation

APPENDIX B

Part 2 of Title 47 of the C.F.R. is amended as follows:

1. The authority citation for Part 2 is revised to read as follows:

Authority: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154,154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. Section 2.1201 is amended by adding paragraph (c) to read as follows:

* * * * *

(c) Nothing in this section prevents importers from shipping goods into foreign trade zones or Customs bonded warehouses, such as is the prescribed procedure under Section 2.1204(a)(5). Radio frequency

[16] We note that there will be some delay, due to administrative and processing requirements, between when the information is provided to Customs and released to the public by the Commission. We anticipate this delay to be from 30 to 60 days. This time period should provide protection between when manufacturers import and market their devices.

[17] Apple Computer, Inc. petition at page 4.

devices capable of causing harmful interference, however, cannot be withdrawn from these areas except in accordance with the provisions of this section.

3. Sections 2.1204(a)(3) and (4) are revised to read as follows:

* * * * *

(3) The radio frequency device is being imported in limited quantities for testing and evaluation to determine compliance with the FCC Rules and Regulations or suitability for marketing. The device will not be offered for sale or marketed. The phrase "limited quantities," in this context, means 200 or fewer units. Prior to importation of more than 200 units, written approval must be obtained from the Chief, Enforcement Division, Field Operations Bureau, FCC. Distinctly different models of a product and separate generations of a particular model under development are considered to be separate devices.

(4) The radio frequency device is being imported in limited quantities for demonstration at industry trade shows and the device will not be offered for sale or marketed. The phrase "limited quantities," in this context, means ten or fewer units. Prior to importation of more than ten units, written approval must be obtained from the Chief, Enforcement Division, Field Operations Bureau, FCC. Distinctly different models of a product and separate generations of a particular model under development are considered to be separate devices.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 5, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NEWSPAPER ASSOCIATION OF AMERICA'S APPLICATIONS FOR REVIEW OF US WEST'S STRUCTURAL RELIEF AND AMERITECH'S STRUCTURAL RELIEF

CC Docket Nos. 88-2, Phase I, and 90-623

The Newspaper Association of America (NAA) (formerly the American Newspaper Publishers Association) filed separate applications for review of two Common Carrier Bureau Memorandum Opinion and Orders (MO&O) removing the structural separation requirements for US West and Ameritech. NAA believes that the Commission should deny US West and Ameritech's petitions for structural relief, or it should remand the petitions for further consideration by the Bureau.

Pursuant to the *BOC ONA Amendment Order*, 5 FCC Rcd 3103, each Bell Operating Company (BOC) is permitted to petition the Commission for relief from the structural separation requirements if it is technically prepared to offer its ONA services, has effective federal tariffs for each of its initial interstate ONA services, and has filed state tariffs for each of its initial intrastate ONA services. NAA argues that the requirements for structural relief fail to provide sufficient protection against anticompetitive conduct by the BOCs. In addition, NAA states that US West and Ameritech did not demonstrate their compliance with these requirements but rather stated that they satisfied the requirements.

NAA also argues that the Common Carrier Bureau was too hasty in acting on US West and Ameritech's petition. NAA states that, since petitions for review are pending before the courts on the Commission's decision to replace structural separation with non-structural safeguards, the Commission should wait until the courts decide this issue.

Interested parties should file comments on NAA's applications for review by **August 31, 1992,** and reply comments by **September 15, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1990 M Street, N.W., Suite 640, Washington, D.C. 20036. Copies of the applications can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Manual for Filing International
Traffic Statistics under
Section 43.61 of the Commission's Rules

ORDER

Adopted: July 20, 1992; Released: July 22, 1992

By the Deputy Chief, Common Carrier Bureau:

1. The Commission recently revised and simplified Section 43.61 of the Federal Communications Commission Rules and Regulations governing reporting of international traffic data. *Report and Order, Amendment of Sections 43.61 of the Commission's Rules*, 7 FCC Rcd 1379 (1992) A *Manual for Filing Section 43.61 Data* (draft manual), dated May 1992, incorporated the simplified filing requirements and was released for notice and comment on May 22, 1992. This order makes minor revisions to the manual based on the comments and releases a revised manual.[1] The revised manual changes the Off-shore U.S. points for which carriers must file complete data, directs carriers to separate facilities-based traffic from pure resale traffic, and includes minor editorial changes. Appendix 1 contains a summary of the comments.

2. In releasing the draft manual, the Bureau stated that it could be used on an interim basis for filing 1991 international traffic data. This *Order* directs carriers to file data in accordance with the revised manual by October 31, 1992, if they have not used the draft manual to prepare the July 31, 1992 filing.

Coverage of U.S. Points

3. GTE questions whether the Commission needs complete country-by-country data for Off-shore U.S. points, and whether the Commission needs data for traffic between any two U.S. points.[2] GTE notes that the manual already exempts some Offshore U.S. points from country-by-country reporting, and that carriers need not file data for traffic between the United States mainland and Puerto Rico.

4. The Commission analyzes data regarding traffic patterns into and out of the United States to assess the continuing efficiency of, and possible need to revise, our international telecommunications policies.[3] These traffic patterns include not only traffic into and out of domestic U.S. points, but also traffic into and out of Off-shore U.S. points.[4] We realize, however, that international carrier issues less frequently center on the smallest markets. Furthermore, some Off-shore U.S. points have no civilian population. Therefore, the draft manual balances the need for market by market data with potential burden, and exempts some points from complete reporting requirements.

5. Prompted by GTE's concern, we have reexamined the reporting requirements for each Off-shore U.S. point listed in the manual. The following table summarizes the reporting requirements by point. We shall require complete country-by country reporting for the larger markets and permit carriers to report traffic to and from the smaller markets on a world total basis. The Commission may, in the future, require carriers to submit more detailed data for the smaller U.S. markets.

Section 43.61 requirements by U.S. point

Country-By-Country Reporting

U.S. point	population
Alaska	550,000
Conterminous U.S.	252,502,000
Guam	145,000
Hawaii	1,108,000
Puerto Rico	2,295,000
U.S. Virgin Islands	102,000

Summary Reporting

U.S. point	population
American Samoa	43,000
Howland Island	*
Jarvis Island	*
Johnston Atoll	1000
Kingman Reef	*
Midway Island	*
Navassa Island	*
Northern Mariana Islands	23,000
Palmyra	*

[1] The revised manual is available for reference in the Industry Analysis Division Reference Room, Common Carrier Bureau, 1250 23rd Street, N.W., Plaza Level. Copies may be purchased by calling Downtown Copy Center (DCC) at (202) 452-1422. The revised manual adopted today replaces the *Revised Filing Manual for Section 43.61 of the FCC's Rules and Regulations*, November 22, 1989, referred to herein as the old manual.

[2] Carriers need not report data for traffic between any two domestic U.S. points. These points are defined as the Conterminous United States, Alaska, Hawaii, and Puerto Rico. All other U.S. points are defined as Off-shore U.S. points. Carriers must report data for traffic between domestic U.S. points and Off-shore U.S. points, and for traffic between any two Off-shore U.S. points.

[3] In this context, we note that at present the Commission treats as dominant certain carriers providing IMTS service into and out of certain offshore U.S. markets. See *International Competitive Carrier Policies*, 102 FCC2d 812, 832 (1982).

[4] It would be difficult to analyze international facilities serving Guam, for example, without considering traffic which is carried over many of the same facilities to the mainland or Hawaii. Furthermore, an analysis of potential entry or market power would be incomplete without considering this traffic.

Wake Island *

* Denotes population under 1000. Some of these points are not served by U.S. carriers at the present time. All U.S. points have been included for completeness.

6. GTE correctly notes that Puerto Rico is treated as a United States point rather than as an Off-shore U.S. point. Presently, carriers need not report traffic between Puerto Rico, conterminous U.S., Alaska, and Hawaii,[5] and any of the 50 states or the District of Columbia. This reflects the Commission's actions to integrate the telecommunications market in Puerto Rico with the domestic market.[6]

Separating Facilities-based Traffic from Resale Traffic

7. WorldCom and Allnet suggest that facilities-based carriers should separately report facilities-based and pure resale traffic. WorldCom sees little burden in separating this traffic, and Allnet warrants that separating the traffic would actually reduce the reporting burden. Both carriers further argue that combining the facilities-based and resale traffic results in double counting, as these calls would be reported by both the reselling carrier and its underlying facilities-based carrier. We agree with the carriers. Under the draft reporting requirements, the Commission could not easily eliminate the double count. Furthermore facilities-based traffic can usually be identified through settlements procedures whereas pure resale traffic can usually be identified from billings by the underlying carrier. Accordingly, the final manual requires carriers to report pure resale traffic separately from other traffic. The manual now includes billing code 5 for pure resale traffic.[7]

8. While the manual continues to require country-by-country data for facilities-based traffic, the manual does not require country-by-country data for pure resale traffic. Instead, carriers must report total minutes, total messages, and total revenues for each pure resale service that they provide.[8] In addition, carriers are not required to file pure resale data on computer disk. The same reduced reporting requirements apply to the pure resale traffic of both facilities-based and pure resale carriers.

Additional Relief for Small Carriers

9. GTE and Allnet also suggest that facilities-based carriers with revenue or volume levels below some specified threshold should be exempt from some reporting requirements, such as filing information on computer disk. In addition, GTE questions the requirement that pure resale carriers file lists of points actually served.

10. The problem raised by GTE and Allnet is greatly mitigated by the decision to apply the resale reporting requirements to pure resale traffic carried by facilities-based carriers. We decline to create other exemptions. Section 43.61 of the Commission's rules requires all facilities-based carriers to file data for all services without regard to any threshold levels.

11. Certainly, our rules may create a disproportionate reporting burden on the smallest facilities-based carriers. The country-by-country reporting requirements, however, allow the Commission to examine traffic and revenues arising from service to specific points. A small carrier with relatively low overall revenues may be a significant service provider to a specific country.

12. Where complete reporting is required, the data must be filed on computer disk. Although the data record format is rigidly specified, it is possible to create data files using a word processor or spreadsheet program on any computer system that can produce disks for an IBM compatible personal computer.[9] The carrier may already plan to prepare the paper copy of the data using a word processor or spreadsheet program, so the additional burden may not be great in all cases. Failing to provide disks merely puts the data entry burden on the Bureau's staff.

13. All carriers filing data for pure resale message toll service must list the international points to which it actually sent traffic during the year. This data will help to provide the Commission with a broad overview of the provision of telecommunications service between the United States and international points. The data may serve to differentiate carriers serving specialized niches from carriers who are serving the overall message toll service market. The information would also be useful to the Commission in meetings with foreign administrations and in dealing with the public. Table 5 of *International Points* contains a list of international points at the level of aggregation at which statistics will be published. Instead of preparing a separate listing, resale carriers may simply check off the points to which they had traffic in 1991.

14. While the simplified reporting requirements incorporated in the manual should solve many problems for carriers, special circumstances may exist. Carriers needing clarification or facing special circumstances should contact the Common Carrier Bureau Industry Analysis Division. Circumstances may exist that justify waiving some aspect of the reporting requirements.

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[5] Nevertheless, the Commission retains the authority to collect such data if needed, for example, to address the rerouting of international traffic between Puerto Rico and other U.S. points.

[6] Tariffs for traffic between the Conterminous United States and Puerto Rico became integrated with the domestic United States tariffs at the same time that Alaska and Hawaii schedules became integrated. Puerto Rico Telephone Company is currently a participant in National Exchange Carrier Association (NECA) pools.

[7] Resold U.S. billed switched service is properly classified as U.S. billed traffic. However, Billing Code 5 should be used if carriers choose to report pure resale traffic on computer disk. This clarifies the proper reporting of GTE Airfone pure resale traffic.

[8] Carriers must provide separate schedules for each Offshore U.S. point that they serve, e.g. Off-shore U.S. points from which their customers originate calls.

[9] One method would be to create a spreadsheet file with column widths equal to the field sizes specified in section 2-B of the manual. Data can then be entered by cell using numeric format for right justified fields, and label format for left justified fields. Using printing commands, the left and top margins should be set to 0, the right margin should be set to 132, and the bottom margin should be set as high as possible. After specifying the data range and selecting a generic IBM or text printer, the file output option would be used.

Transition Reporting

15. MCI states that it is unable to file all data by July 31 using the draft manual. MCI proposes to file some data using the draft manual and some data using the old manual. MCI plans to refile all data in accordance with the draft or final manual by October 31. October 31 is the date on which carriers must file corrections to data filed the previous July. MCI's proposal offers a reasonable means to effect a transition to full reporting under the current Section 43.61 rules. Carriers who file on July 31 using the old manual must refile by October 31, 1992 using the revised manual released today. Carriers who file on July 31 using either the draft manual or the revised manual are only required to file corrections on October 31, 1992.

Ordering Clauses

16. IT IS ORDERED THAT the *Manual for Filing Section 43.61 Data in accordance with the FCC's Rules and Regulations*, July 1992, is hereby released.

17. IT IS FURTHER ORDERED THAT all carriers not filing data on July 31, 1992 in accordance with the *Draft Manual*, refile their international traffic data by October 31, 1992 in accordance with the manual released today.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

APPENDIX 1

Summary of Comments and Reply Comments

GTE Service Corporation (GTE) filed comments on behalf of its affiliated telephone, satellite, and mobile service companies. GTE challenges the need for statistics on traffic between domestic U.S. points and Off-shore U.S. points.[10] GTE notes that such traffic may be classified as international traffic for tariffing purposes, but is not involved in settlements with foreign entities. GTE also states that the Commonwealth of the Northern Mariana Islands enjoys the same status as Puerto Rico.

GTE observes that carriers must provide the same data for Guam, Midway Island, Wake Island and the U.S. Virgin Islands as they provide for U.S. points. Carriers serving other Off-shore points may use the reduced reporting requirements afforded pure resale carriers. GTE believes that the resale reporting requirements would be adequate for all Off-shore U.S. points.

GTE seeks clarification on traffic carried by GTE Airfone Incorporated, which provides telephone service to airline passengers who may be in either domestic or international airspace when calls are placed. Airfone provides service by reselling the U.S. billed service of facilities-based carriers. GTE asks the Commission to confirm that all Airfone traffic should be reported as U.S. billed.

GTE states that the reporting requirements are burdensome for small facilities-based carriers and for start up services. GTE suggests that the Commission reduce the burden on carriers with less than 20 circuits or less than $1 million in annual revenue, and that the Bureau have authority to adjust reporting requirements on a case by case basis. In addition, GTE questions the need to have resellers list each point that they actually served during the year.

World Communications, Inc. (WorldCom) states that it has direct operating agreements with several overseas administrations and hauls traffic to these points using its own facilities. WorldCom also provides a large proportion of its traffic on a resale basis. WorldCom is concerned that combining its facilities-based and resale traffic will result in over counting traffic, since the resold traffic will be reported by more than one carrier. WorldCom states that carriers can readily identify traffic that is sent directly, and that it would not be burdensome for carriers to report separately facilities-based and resale traffic.

MCI fully supports the revised reporting requirements, but notes that it cannot fully implement the changes by the July 31 filing date. MCI proposes to file some information using the old reporting format, and to refile by October 31, 1992 using the new format.

Allnet Communications Services Inc. (Allnet) filed reply comments supporting suggestions made by WorldCom and GTE. Allnet provides the majority of its international traffic on a pure resale basis, but does have direct operating agreements with two overseas administrations and carries "a de minimis amount of traffic" over its own facilities. Allnet argues that it is burdensome to report all traffic on a country-by-country basis, and therefore supports WorldCom's proposal to permit aggregate reporting of resale service. Allnet supports GTE's suggestion that the Manual be written to allow flexibility in establishing reporting requirements for new services or for carriers in particular circumstances. In particular, Allnet believes that facilities-based carriers serving fewer than fifteen countries should be exempt from filing on diskette.

[10] The conterminous United States, Alaska, Hawaii, and Puerto Rico are classified as domestic U.S. points. Other U.S. points are referred to as Off-shore U.S. points.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 8, 1992

US WEST REQUESTS AUTHORITY TO CONTINUE TO CHARGE PREMIUM RATES FOR FGD SERVICE

Pleading Cycle Established
COMMENTS: August 7, 1992
REPLY COMMENTS: September 7, 1992

Under the Modified Final Judgment (MFJ), the Bell Operating Companies (BOCs) were obligated to provide equal access upon request. To meet this obligation, the BOCs were required to upgrade their network equipment. In a number of its electromechanical end offices, US West has used alternate equal access technologies as a way of meeting its equal access obligations.

On June 30, 1992, US West filed a Petition for Authority to Continue to Charge Premium Rates for Feature Group D (FGD) Service for 18 offices which will continue to use alternate equal access technologies past the 1992 deadline set by the Court. US West states that there are business, technical and state regulatory reasons why the switches in question will not be replaced by the deadline. US West asks that it be allowed to continue to charge premium rates for FGD services being provided from the 18 offices in question.

Interested parties may file comments regarding this petition no later than **August 7, 1992**. Reply comments may be filed no later than **September 7, 1992.**

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with Downtown Copy Center, the Commission's duplicating contractor, at its office in Suite 640, 1919 M Street, N.W., Washington, D.C. 20554, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Pat Nagle, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of

Provision of Access for
800 Service

ORDER

Adopted: July 18, 1992; Released: July 28, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 19, 1992, the Ameritech Operating Companies (Ameritech) filed a petition for waiver of the access time standards for 800 data base access established in the Memorandum Opinion and Order on Reconsideration in this docket.[1] We now grant Ameritech's requested waiver of the March 1993 access time standard but deny, without prejudice, its requested waiver of the March 1995 standard.

II. BACKGROUND

2. The Reconsideration Order established revised access time standards for the implementation of the 800 data base system. Under the revised standards, each local exchange carrier (LEC) may replace the current NXX access system with mandatory data base access when that LEC can reduce access times for 97% of its originating 800 data base access traffic to five seconds or less, provided that, within two years thereafter, (a) none of its data base 800 traffic experiences an access time of greater than five seconds, and (b) the mean access time for all of its 800 data base traffic is 2.5 seconds or less. The Commission required the Bell Operating Companies (BOCs) and GTE to meet the first tier requirement (the 5-second/97% standard) by March 1993.[2]

3. The revised standards reflected a careful balancing of the benefits of the data base system, most notably, 800 number portability, with the costs of increased access delays. They were also the product of undisputed industry data about access times under both the current NXX system and the data base system. In particular, the Commission relied on an industry consensus at the time that: (1) access times under NXX access are 1.9 seconds, if the IXC interconnects at the end office, and 3.5 seconds, if the IXC interconnects at a tandem; (2) about 2/3 of current NXX traffic is delivered directly from the end office (so that the mean access time today is about 2.5 seconds); and (3) access times under a data base system would be 0.8 seconds, 1.0 seconds, 4.1 seconds, 4.8 seconds, or 8.1 seconds, depending upon the configuration of the originating LEC's network and the level of SS7 deployment in that network.[3]

III. AMERITECH'S WAIVER PETITION

4. Ameritech states that following the release of the Reconsideration Order, as it and other BOCs began the process of preparing the national 800 data base implementation plan, they began testing access times using different network configurations and end office and access tandem switch equipment. It claims that these tests revealed that, both for NXX access and data base access, access times vary by switch type and that certain digital switches produce longer access times than had been indicated by previous tests using other switches.[4] For NXX access, the tests showed that access times range from 1.5 to 3.1 seconds for end office connections and 3.3 to 5.8 seconds for access tandem connections.[5] For data base access, the tests showed that Ameritech would not be able to meet the Commission's five second standard simply by implementing SS7 interconnection at access tandems. In light of these test results, Ameritech asks for a waiver of the 1993 and 1995 access time standards. The following chart sets forth the access times Ameritech proposes:[6]

	Percentage of Traffic Less Than:				
Date	**5 Seconds**	**5.5 Seconds**	**6 Seconds**	**6.5 Seconds**	**Mean**
3/93	87	93	95.7	98.3	2.5
3/95	97				1.1

5. Ameritech states that because NXX access times are in many cases longer than had been previously represented, its waivers would not result in access time increases in

[1] *See* Provision of Access for 800 Service, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991) (*Reconsideration Order*). As defined in the Reconsideration Order, "access time" is the time that begins when the caller completes dialing an 800 call and ends when the call is delivered by the originating local exchange carrier (LEC) to an interexchange carrier (IXC). Callers experience additional delay as the IXC then completes the call through its network and the terminating LEC's network to the 800 subscriber. *Id.* at note 4.

[2] 6 FCC Rcd at 5425.

[3] *Id.* at 5422-23, 5425.

[4] Ameritech Petition at 5.

[5] Ameritech Petition at 9, *citing* Bellcore 800 Database Access Time Study, Special Report SR-NWT-002251, Issue 1, February 1992 at 21. The Bellcore Access Time Study was attached as an appendix to the BOC/GTE 800 Data Base Implementation Plan, filed March 2, 1992.

[6] These access time projections represent Ameritech's capabilities -- not the actual access times that will occur. In other words, these data assume that IXCs use SS7 interconnection wherever Ameritech makes it available. If some IXCs do not elect to use SS7 interconnection, those IXCs' access times will be longer. These projections also assume, of course, that the 800 data base implementation process proceeds as planned, and in particular, that LEC/IXC SS7 interconnection testing and trunk conversions scheduled over the next six to eight months occur on schedule. Finally, these projections assume the installation of a software patch in certain Northern Telecom and AT&T switches that will reduce access times for those switches. The Northern Telecom patch is currently available, while the AT&T patch is scheduled for availability in November or December 1992.

excess of the 3.1 second maximum contemplated by the Commission when it adopted a 5-second access time standard. It states that in March 1993, 57% of its 800 traffic would experience a decrease in access times of one to four seconds, 30% would experience an increase of no more than 1.2 seconds, and 1 would experience increases of between 2.1 and 3.1 seconds.[7]

6. Ameritech claims, further, that it has substantially accelerated its SS7 deployment plans and cannot further accelerate these plans without jeopardizing network reliability.[8] In addition, it states that while it cannot meet the 5 second/97% standard in March 1993, it will exceed FCC access time standards in other respects. For example, it states that by March 1993, it will meet the 2.5 second mean access time standard that the Commission established for March 1995. In addition, it states that its mean access time in 1995 will be 1.1 second.[9]

7. Ameritech also asks us to waive the March 1995 requirement that all access times be 5 seconds or less. It states that between March 1993 and March 1995, it will continue with an aggressive SS7 deployment program. It claims, however, that even with this program, it is not feasible to reduce access times for all traffic to less than five seconds. Specifically, it argues that in order to achieve that result, it would have to upgrade or replace fifty switches that serve only three percent of its traffic.[10] This, it claims, makes no sense from an economic or network perspective.[11]

IV. POSITIONS OF OTHER PARTIES

8. Commenting parties address Ameritech's waiver request in conjunction with similar waiver requests filed by other LECs. AT&T, CompTel, NDC, and ARINC generally oppose the LEC waivers. VISA also opposes the waivers, pending more detailed information on their impact on users. USTA, Centel, MCI, and Sprint support them, although MCI supports only a waiver of the 1993 access time standard, not the 1995 access time standard.[12] Other parties, such as Ad Hoc, ICA, and Cable & Wireless neither support nor oppose the waivers in their comments, pending further information.[13]

9. Parties opposing the waivers claim that the LECs do not adequately support their claims that waivers are necessary and warranted. For example, AT&T argues that LEC claims as to the cost of complying with the access time standards are not substantiated.[14] Similarly, CompTel and ARINC assert that LECs have not demonstrated that acceleration of their SS7 deployment plans would jeopardize network reliability.[15] They argue that waivers should not be granted unless LECs provide more detailed substantiation of LEC network reliability concerns, including quantification of the risks of outages or increased blockage. AT&T and ARINC claim, further, that the waivers would upset the careful balancing of interests incorporated into the access time standard and would degrade the quality of 800 access service.[16] In addition, several parties state that LECs did not provide sufficient information about the parameters of the tests underlying the new access time estimates. They argue that without this information, they cannot assess the accuracy or completeness of the revised data or its impact on IXCs or end users.[17] Finally, NDC argues that the waivers are really untimely petitions for reconsideration of the access time standard insofar as they assume the invalidity of that standard.[18]

10. Parties supporting the waivers claim that the small increase in access times that the waivers would permit is acceptable, at least for March 1993.[19] MCI urges that the Commission grant a blanket waiver that would permit LECs to implement mandatory data base access when 95% of its traffic experiences an access time of 6 seconds or less.[20] MCI opposes LEC requests for a waiver of the 1995 access time standards, claiming that it is premature to address these requests at this time, particularly since technological developments and changed network deployment plans may render these waivers unnecessary.[21]

11. Parties that neither support nor oppose the waivers express more concern about the reliability and firmness of the access time data underlying the LEC waiver requests than with the revised access time standards proposed in the petitions.[22] Most of these parties echo concerns voiced by other parties that the LECs did not provide sufficient information about how the access time tests were conducted, information that they claim is essential to an assessment of the reliability of these tests.[23] In addition, Ad Hoc notes that some LECs did not specifically commit to achieving the access times set forth in their waiver petitions, and it asks for such commitments. Several parties also ask for various additional information about the extent to which nonconforming access times would exceed five seconds and the geographic distribution of traffic with higher access times.[24]

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[7] Ameritech Petition at 9-10.
[8] Ameritech Petition at 11-13.
[9] Ameritech Petition at 10.
[10] Ameritech Petition at 13.
[11] Ameritech Petition at 14.
[12] Sprint initially opposed the waiver request of one LEC (US West) but withdrew its opposition in light of representations made in that LEC's Reply. *See* letter from Norina Moy, Manager, Federal Regulatory Affairs, US Sprint, to Donna Searcy, Secretary, FCC, May 22, 1992.
[13] ICA asks us to establish a second pleading cycle on the waiver petitions following receipt of the BOC/GTE Reply to comments on the BOC/GTE 800 Data Base Implementation Plan. ICA Comments at 7.
[14] AT&T Comments at 4.
[15] CompTel Comments at note 7; ARINC Comments at 9.
[16] AT&T Comments at 3-5; ARINC Comments at 1-5.
[17] *See* AT&T Comments at 5-6; CompTel Comments at 4-5; Allnet Comments at 1-2; ICA Comments at 5-6; NDC Reply at 3.
[18] NDC Reply at 6-7.
[19] *See* USTA Comments at 2-3; MCI Comments at 6; Sprint Comments at 13. *Cf.* Ad Hoc Comments at 6 ("A *slight* slippage of access time standards is not itself a terribly adverse matter.")
[20] MCI Comments at 6.
[21] In reply, some LECs indicate that they would not oppose a deferral of the 1995 waivers at this time. *See* NYNEX Reply at note 9; US West Reply at 16-17.
[22] *See, e.g.*, Ad Hoc Comments at 7-11.
[23] *See, e.g.*, Cable & Wireless Comments at Appendix 1; Ad Hoc Comments at 10-11.
[24] *See, e.g.*, ICA Comments at 7-11. *See also* NDC Comments at 9-12; VISA Comments at 3-7. ICA states that each LEC should be required to make available "exception lists" showing each end office where access delays in excess of 5.5 seconds may

V. DISCUSSION

12. We now grant Ameritech's requested waiver of the 1993 access time standards but deny without prejudice its request for a waiver of the 1995 access time standards. We believe that Ameritech has demonstrated good cause for its requested waiver of the 1993 access time standards, but that it is premature to consider waiving the 1995 standards.

13. Pursuant to Section 1.3 of the Commission's Rules, the Commission may waive any provision of its rules or orders on its own motion or on petition if good cause therefor is shown.[25] In supporting its case for a waiver, an applicant must demonstrate that there are special circumstances that warrant a deviation from the rule and must show how such deviation will serve the public interest.[26] We believe that Ameritech has met this burden with respect to the 1993 access time standard.

14. The record shows that in response to the Reconsideration Order, Ameritech has undertaken an ambitious SS7 deployment program. For example, it will replace 137 switches during 1992 and 1993, and convert as many as 360,000 trunks to SS7. In addition, it will deploy up to seventeen new Signal Transfer Points (STPs).

15. Indeed, Ameritech has accelerated its end office SS7 plans beyond the levels contemplated in the Reconsideration Order and well beyond Ameritech's previous projected levels. Thus, whereas Ameritech had previously proposed deploying SS7 in end offices representing 34% of its traffic by the end of 1993, Ameritech will now achieve nearly sixty percent end office deployment by March 1993.[27] As a result of this SS7 program, Ameritech will be capable of achieving mean access times in 1993 that are *better* than those that exist today, and by 1995, its access times will be well below the 2.5 second standard established in the Reconsideration Order. Thus, the inability of Ameritech to satisfy the 1993 access time standard is not due to any deficiency or laxness in its SS7 efforts.

16. At the same time, it does not appear that it would be feasible for Ameritech to meet the 1993 access time standard.[28] According to Ameritech, meeting this standard would require it to upgrade 247 additional switches, convert 51,000 additional trunks, and add five new STPs.[29] No one disputes these claims. We agree that it would be extremely difficult, if not impossible, for Ameritech to accomplish these changes, along with all the other work that has to be performed by March 1993, without compromising network reliability.[30]

17. We note, further, that since current NXX access times are longer than previously represented, the alternative access times proposed by Ameritech would not result in larger increases in access times than the five-second standard contemplated. The Reconsideration Order permitted maximum increases of 3.1 seconds or less for 97% of each LEC's traffic; even with this waiver, Ameritech would meet this standard. Thus, a waiver is fully consistent with the Commission's intent to allow "at the outset of 800 data base access a temporary and limited increase in access times, while requiring shortly thereafter that access times are reduced to levels at least as good as they are today."[31] We therefore find that Ameritech has demonstrated good cause for a waiver of the 1993 access time standard.[32]

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occur. In reply, MCI argues that as the implementation process unfolds and LECs' and IXCs' network configuration plans become more definite, carriers will provide the necessary access time information to end users. MCI states that the need for "exception lists," as recommended by ICA, is "not obvious." MCI Reply at 6.

[25] 47 C.F.R. § 1.3.

[26] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990).

[27] *See* Ameritech Petition at 11; letter from Michael T. Mulcahy, Senior Attorney, Ameritech, to Donna R. Searcy, Secretary, FCC, March 18, 1992.

[28] The five-second standard was not based on empirical data indicating that access times greater than five seconds are *per se* unacceptable. Rather, the standard was based on: (1) data indicating that data base system access times would be either 1 second or less, 4.1 seconds, 4.8 seconds, or 8.1 seconds; (2) a consensus among the parties that access times of 4.1 or 4.8 seconds could be achieved at far less cost than access times of 1 second; and (3) data showing current NXX access times to be either 1.9 or 3.5 seconds. All of these assumptions now turn out to be incorrect. The architectures that were thought to produce access times of 4.1 or 4.8 seconds sometimes result in access times of more than five seconds. Meeting the five second standard would thus be far more burdensome than previously thought.

[29] Ameritech Petition at 12.

[30] While some parties argue that LECs should be required to quantify the risks to network reliability before receiving waivers, such risks are inherently incapable of quantification. Virtually all parties agree that meeting the March 1993 deadline is in itself an ambitious undertaking. Parties also agree that considerable efforts must be made -- even with these waivers -- to ensure that all network changes are adequately tested and that the cutover to 800 data base access proceeds in an operationally sound and nondisruptive manner. *See, e.g.*, AT&T Comments at 6-7; NDC Reply at 4-5. Given the substantial amount of work that is already being perfomed under tight deadlines, we are satisfied that the additional network changes necessary to meet fully the 1993 five-second access time standard could not be accomplished without posing additional, undue risks to network reliability. That these incremental risks cannot be quantified in no way negates their significance.

[31] 6 FCC Rcd. at 5425.

[32] We note also that Ameritech has made available to the industry detailed information about its switch configurations and SS7 deployment plans, so that Ameritech's access time capabilities can be determined on an end office-by-end office basis. Under the circumstances, the "exception list' sought by ICA is not necessary. To the extent users seek information about what access times actually will be under a data base system, this can be determined only when IXCs make available their network interconnection plans. We decline to defer consideration of Ameritech's waiver petition until all IXCs providing 800 service in Ameritech territory offer this information. We also note that the LECs have responded to questions raised in the record about the methodology and assumptions used in the new access time tests, and we are satified that the access time data provided are reasonably reliable. *See* BOC/GTE Response to Comments on Implementation Plan for 800 Data Base Access Service, Appendix C. Finally, we reject NDC's argument that the LEC waiver petitions must be viewed as untimely petitions for reconsideration. Each of these petitions, including the Ameritech petition at hand, demonstrates good cause for a limited waiver of the 1993 access time standards. Moreover, waivers are an appropriate procedural vehicle insofar as the circumstances necessitating each waiver and the scope of each waiver request differ.

18. The Commission has time and again emphasized the importance of 800 number portability to consumers and to a fully competitive 800 services marketplace. Thus, for example, in the Reconsideration Order the Commission stated:

> Commenters representing a broad cross-section of interests have stressed, both in this proceeding and in our proceeding examining competition in the interstate interexchange marketplace, the importance of 800 number portability. We concur. The records in these proceedings demonstrate that number portability will not only increase competition in the 800 services marketplace, but provide customers with more flexibility and more options in designing their 800 service.[33]

The waiver that we now grant will help ensure that the public receives these significant benefits as quickly as possible. At the same time, given the limited scope of this waiver, we are confident that it will have only a minor impact on 800 access times.

19. In granting Ameritech a waiver of the 1993 access time standards, we emphasize that we condition this waiver on Ameritech's commitment to achieve the access time capabilities described in its waiver petition and *ex parte* presentations to Commission staff.[34] In addition, Ameritech must fulfill its commitment to deploy, upon availability, the AT&T and Northern Telecom software patches so as to reduce access times for the affected switches to the maximum extent possible.[35]

20. We deny, without prejudice, Ameritech's request for a waiver of the 1995 access time standard. While Ameritech might be able to demonstrate in the future that good cause exists for a waiver of the 1995 requirements, it is premature to consider such a waiver request at this time. We note that LEC SS7 deployment plans have changed substantially over the course of the last few years, and it is likely that further changes will occur. Moreover, technological developments, including switching software upgrades that are not currently available, may render Ameritech's 1995 waiver request unnecessary. Therefore, Ameritech has not demonstrated good cause at this time for a waiver of the 1995 access time standards.

VI. ORDERING CLAUSE

21. Accordingly, pursuant to the authority contained in Sections 0.91(a) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 (a) and 0.291, 0IT IS ORDERED that the petition for waiver filed March 19, 1992, by Ameritech IS HEREBY GRANTED IN PART AND DENIED IN PART as described in this order.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[33] 6 FCC Rcd at 5426 (footnote omitted).
[34] See note 15, *supra*.
[35] *See* note 6, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of

Provision of Access for
800 Service

ORDER

Adopted: July 28, 1992; Released: July 28, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On April 3, 1992, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a petition for waiver of the March 1993 access time standard for 800 data base access established in the Memorandum Opinion and Order on Reconsideration in this docket.[1] We now grant Bell Atlantic's waiver.

II. BACKGROUND

2. The Reconsideration Order established revised access time standards for the implementation of the 800 data base system. Under the revised standards, each LEC may replace the current NXX access system with mandatory data base access when that LEC can reduce access times for 97% of its originating 800 data base access traffic to five seconds or less, provided that, within two years thereafter, (a) none of its data base 800 traffic experiences an access time of greater than five seconds, and (b) the mean access time for all of its 800 data base traffic is 2.5 seconds or less. The Commission required the Bell Operating Companies (BOCs) and GTE to meet the first tier requirement (the 5-second/97% standard) by March 1993.[2]

3. The revised standards reflected a careful balancing of the benefits of the data base system, most notably, 800 number portability, with the costs of increased access delays. They were also the product of undisputed industry data about access times under both the current NXX system and the data base system. In particular, the Commission relied on an industry consensus at the time that: (1) access times under NXX access are 1.9 seconds, if the IXC interconnects at the end office, and 3.5 seconds, if the IXC interconnects at a tandem; (2) about 2/3 of current NXX traffic is delivered directly from the end office (so that the mean access time today is about 2.5 seconds); and (3) access times under a data base system would be 0.8 seconds, 1.0 seconds, 4.1 seconds, 4.8 seconds, or 8.1 seconds, depending upon the configuration of the originating LEC's network and the level of SS7 deployment in that network.[3]

III. BELL ATLANTIC'S WAIVER PETITION

4. Bell Atlantic states that following the release of the Reconsideration Order, as it and other BOCs began implementing the national 800 data base plan, they began testing access times using various types of switching equipment. It claims that these tests revealed that, both for NXX access and data base access, access times vary by switch type and are in some cases longer than had been previously thought.[4] For NXX access, Bell Atlantic states, the tests showed that mean access times for tandem connections are significantly longer than the 3.5 seconds the Commission expected.[5] For data base access, the tests showed that for certain switches, access times would exceed five seconds, even with SS7 interconnection at the access tandem. In light of these test results, Bell Atlantic asks for a waiver of the 1993 access time standards. The following chart sets forth the access times Bell Atlantic proposes:[6]

	Percentage of Traffic Less Than:			
Date	**5 Seconds**	**5.5 Seconds**	**6 Seconds**	**6.5 Seconds**
3/93	85	97		

5. Bell Atlantic claims that it has substantially accelerated its network deployment plans and will, in fact, exceed the SS7 deployment levels contemplated by the Commission's 1993 access time standards. It claims that despite its extensive SS7 network, it cannot meet fully the 1993 ac-

[1] *See* Provision of Access for 800 Service, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991) (*Reconsideration Order*). As defined in the Reconsideration Order, "access time" is the time that begins when the caller completes dialing an 800 call and ends when the call is delivered by the originating local exchange carrier (LEC) to an interexchange carrier (IXC). Callers experience additional delay as the IXC then completes the call through its network and the terminating LEC's network to the 800 subscriber. *Id.* at note 4.

[2] 6 FCC Rcd at 5425.

[3] *Id.* at 5422-23, 5425.

[4] Bell Atlantic Petition at 3, 5-6, Attachment 1.

[5] Bell Atlantic Petition at 7. Bell Atlantic derives this data from the Bellcore 800 Database Access Time Study, SR-NWT-002251, Issue 1, February 1992 at 21, attached to BOC/GTE Implementation Plan for 800 Data Base Access Service, filed March 2, 1992.

[6] These access time projections represent Bell Atlantic's capabilities -- not the actual access times that will occur. In other words, these data assume that IXCs use SS7 interconnection wherever Bell Atlantic makes it available. If some IXCs do not elect to use SS7 interconnection, those IXCs' access times will be longer. These projections also assume, of course, that the 800 data base implementation process proceeds as planned, and in particular, that LEC/IXC SS7 interconnection testing and trunk conversions scheduled over the next six to eight months occur on schedule. Finally, these projections assume the installation of a software patch in certain Northern Telecom, Siemens, and AT&T switches that will reduce access times for those switches. The Northern Telecom patch is currently available, while the Siemens and AT&T patches are scheduled for availability later this year. *See* Bell Atlantic Petition at 3-4.

cess times because of the slow pace of SS7 interconnection within its network. It states that it requires extensive and thorough testing before it will interconnect with an IXC network and that this process is slow and labor-intensive. It asserts that in light of recent SS7 outages in its territory, it is proceeding with extra caution in this area. As a result, it states, its SS7 interconnection efforts will not be even close to complete by March 1993.

6. Bell Atlantic claims, further, that because NXX access times are in many cases longer than had been previously represented, its waiver would not result in access time increases in excess of the 3.1 second maximum contemplated by the Commission when it adopted a 5-second access time standard.[7] It states, further, that it will deploy SS7 in all of its end offices by the end of 1994 and that it fully expects to meet the Commission's 1995 access time requirements.[8]

IV. POSITIONS OF OTHER PARTIES

7. Because Bell Atlantic's waiver petition was filed prior to the due date for comments on several other LEC waiver petitions, parties address Bell Atlantic's waiver request in conjunction with these other waivers.[9] AT&T, CompTel, NDC, and ARINC generally oppose the LEC waivers. VISA also opposes the waivers, pending more detailed information on their impact on users. USTA, Centel, MCI, and Sprint support them.[10] Other parties, such as Ad Hoc, ICA, and Cable & Wireless neither support nor oppose the waivers in their comments, pending further information.[11]

8. Parties opposing the waivers claim that the LECs do not adequately support their claims that waivers are necessary and warranted. For example, AT&T argues that LEC claims as to the cost of complying with the access time standards are not substantiated.[12] Similarly, CompTel and ARINC assert that LECs have not demonstrated that acceleration of their SS7 deployment plans would jeopardize network reliability.[13] They argue that waivers should not be granted unless LECs provide more detailed substantiation of LEC network reliability concerns, including quantification of the risks of outages or increased blockage. AT&T and ARINC claim, further, that the waivers would upset the careful balancing of interests incorporated into the access time standard and would degrade the quality of 800 access service.[14] In addition, several parties state that LECs did not provide sufficient information about the parameters of the tests underlying the new access time estimates. They argue that without this information, they cannot assess the accuracy or completeness of the revised data or its impact on IXCs or end users.[15] Finally, NDC argues that the waivers are really untimely petitions for reconsideration of the access time standard insofar as they assume the invalidity of that standard.[16]

9. Parties supporting the waivers claim that the small increase in access times that the waivers would permit is acceptable, at least for March 1993.[17] MCI urges that the permit LECs to implement mandatory data base access when 95% of its traffic experiences an access time of 6 seconds or less.[18]

10. Parties that neither support nor oppose the waivers express more concern about the reliability and firmness of the access time data set forth in the LEC waivers than with the revised access time standards proposed in the waiver petitions.[19] Most of these parties echo other parties' concern that insufficient information was provided about how the access time tests were conducted, information that they claim is essential to an assessment of the reliability of these tests.[20] In addition, Ad Hoc notes that some LECs did not specifically commit to achieving the access times set forth in their waiver petitions, and it asks for such commitments.[21] Several parties also ask for various additional information about the extent to which nonconforming access times would exceed five seconds and the geographic distribution of traffic with higher access times.[22]

V. DISCUSSION

11. We now grant Bell Atlantic's request for a waiver of the 1993 access time standards. We find that Bell Atlantic has demonstrated good cause for its requested waiver and that such waiver would be in the public interest.

12. Pursuant to Section 1.3 of the Commission's Rules, the Commission may waive any provision of its rules or orders on its own motion or on petition if good cause therefor is shown.[23] In supporting its case for a waiver, an applicant must demonstrate that there are special circum-

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[7] Letter from Marie Breslin, Director FCC Relations, Bell Atlantic, to Donna Searcy, Secretary, FCC, July 9, 1992.

[8] *See* Bell Atlantic Petition at 5 and 8; Bell Atlantic Reply at 3.

[9] Only NDC and MCI filed separate comments on the Bell Atlantic waiver. Both of these parties take the same position in their comments as they take towards the other waivers.

[10] Sprint initially opposed US West's waiver request but withdrew its opposition in light of the representations made in US West's Reply Comments. *See* letter from Norina Moy, Manager, Federal Regulatory Affairs, US Sprint, to Donna Searcy, Secretary, FCC, May 22, 1992.

[11] ICA asks us to establish a second pleading cycle on the waiver petitions following receipt of the BOC/GTE Reply to comments on the BOC/GTE 800 Data Base Implementation Plan. ICA Comments at 7.

[12] AT&T Comments at 4.

[13] CompTel Comments at note 7; ARINC Comments at 9.

[14] AT&T Comments at 3-5; ARINC Comments at 1-5.

[15] *See, e.g.,* AT&T Comments at 5-6; CompTel Comments at 4-5; Allnet Comments at 1-2; ICA Comments at 5-6; NDC Reply at 3.

[16] NDC Reply at 6-7.

[17] *See* USTA Comments at 2-3; MCI Comments at 6; Sprint Comments at 13. *Cf.* Ad Hoc Comments at 6 ("A *slight* slippage of access time standards is not itself a terribly adverse matter.")

[18] MCI Comments at 6.

[19] *See, e.g.* Ad Hoc Comments at 7-11.

[20] *See, e.g.,* Cable & Wireless Comments at Appendix 1, Ad Hoc Comments at 10-11.

[21] Ad Hoc Comments at 9.

[22] *See e.g.,* ICA Comments at 7-11. *See also* NDC Comments at 9-12; VISA Comments at 3-7. ICA states that each LEC should be required to make available "exception lists" showing each end office where access delays in excess of 5.5 seconds may occur. In reply, MCI argues that as the implementation process unfolds and LECs' and IXCs' network reconfiguration plans become more definite, carriers will provide the necessary access time information to end users. MCI states that the need for "exception lists," as recommended by ICA is "not obvious." MCI Reply at 6.

[23] 47 C.F.R. § 1.3.

stances that warrant a deviation from the rule and must show how such deviation will serve the public interest.[24] We find that Bell Atlantic has met this burden with respect to the 1993 access time standard.

13. The record shows that Bell Atlantic has undertaken an extremely ambitious SS7 deployment schedule. Indeed, Bell Atlantic already has deployed SS7 capabilities in all of its access tandems and in end offices serving 97% of its access lines.[25] Moreover, by July 1994, it will have replaced all of its end offices that cannot support SS7 signaling, and by the end of 1994, it will have implemented SS7 in 100% of its end offices. No LEC has undertaken a more aggressive SS7 deployment program.

14. While Bell Atlantic's desire to proceed with extra caution in the SS7 interconnection process apparently precludes it from meeting fully the Commission's 1993 access time standard, Bell Atlantic seeks only a relatively minor waiver of this standard.[26] Specifically, it requests only that it be permitted an additional one half second in access time for twelve percent of its traffic. Moreover, it states that it expects to meet the 1993 access time standard in full "at the very latest by mid 1994."[27]

15. We note, further, that since current NXX access times are longer than previously represented, the alternative access times proposed by Bell Atlantic would not result in larger increases in access times than the five-second standard contemplated.[28] The Reconsideration Order permitted maximum increases of 3.1 seconds or less for 97% of each LEC's traffic even with this waiver, Bell Atlantic would meet this standard. Thus, a waiver is fully consistent with the Commission's intent to allow "at the outset of 800 data base access a temporary and limited increase in access times, while requiring shortly thereafter that access times are reduced to levels at least as good as they are today."[29] Under the circumstances, we find that Bell Atlantic has demonstrated good cause for a limited waiver of the 1993 access time standard.[30]

16. The Commission has time and again emphasized the importance of 800 number portability to consumers and to a fully competitive 800 services marketplace. Thus, for example, in the Reconsideration Order the Commission stated:

> Commenters representing a broad cross-section of interests have stressed, both in this proceeding and in our proceeding examining competition in the interstate interexchange marketplace, the importance of 800 number portability. We concur. The records in these proceedings demonstrate that number portability will not only increase competition in the 800 services marketplace, but provide customers with more flexibility and more options in designing their 800 service.[31]

The waiver that we now grant will help ensure that the public receives these significant benefits as quickly as possible. At the same time, given the limited scope of this waiver, we are confident that it will have only a minor impact on 800 access times.

17. In granting Bell Atlantic its requested waiver of the 1993 access time standards, we emphasize that we require Bell Atlantic to achieve the access time capabilities stated in its waiver petition. In addition, noting Bell Atlantic's representation that it "is committed...to do what it can to better [its access time projections] and is confident that it will be able to do so,"[32] we strongly encourage Bell Atlantic to proceed aggressively with its SS7 interconnection efforts, consistent with network reliability goals. In addition, Bell Atlantic must fulfill its commitment to deploy, upon availability, the AT&T, Siemens, and Northern Telecom software patches so as to reduce access times for the affected switches to the maximum extent possible.[33]

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[24] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990).

[25] Bell Atlantic Petition at 8.

[26] While it may be that Bell Atlantic could expedite its SS7 interconnection testing so as to meet the 1993 access time standard, given the relatively minor nature of the waiver Bell Atlantic requests, and its significant commitment to end office SS7 deployment, we believe it is reasonable to allow Bell Atlantic the flexibility to proceed with an extra measure of caution in its implementation of SS7 interconnection.

[27] Bell Atlantic Reply at 5.

[28] The five-second standard was not based on empirical data indicating that access times greater than five seconds are *per se* unacceptable. Rather, the standard was based on: (1) data indicating that data base system access times would be either 1 second or less, 4.1 seconds, 4.8 seconds, or 8.1 seconds; (2) a consensus among the parties that access times of 4.1 or 4.8 seconds could be achieved at far less cost than access times of 1 second; and (3) data showing current NXX access times to be either 1.9 or 3.5 seconds. All of these assumptions now turn out to be incorrect. The architectures that were thought to produce access times of 4.1 or 4.8 seconds sometimes result in access times of more than five seconds. Meeting the five second standard would thus be far more burdensome than previously thought.

[29] 6 FCC Rcd. at 5425.

[30] We note, also, that Bell Atlantic has made available to the industry detailed information about its switch configurations and SS7 deployment plans so that Bell Atlantic's access time capabilities can be determined on an end office-by-end office basis. Under the circumstances, the "exception list" sought by ICA is not necessary. To the extent users seek information about what access times actually will be under a data base system, this can be determined only when IXCs make available their network interconnection plans. We decline to defer consideration of Bell Atlantic's waiver petition until all IXCs providing 800 service offer this information. We also note that the LECs have responded to the questions raised in the record about the methodology and assumptions used in the new access time tests, and we are satisfied that the access time data provided are reasonably reliable. *See* BOC/GTE Response to Comments on Implementation Plan for 800 Data Base Access Service, Appendix C. Finally, we reject NDC's argument that the LEC waiver petitions must be viewed as untimely petitions for reconsideration. Each of these petitions, including the Bell Atlantic petition at hand, demonstrates good cause for a limited waiver of the 1993 access time standards. Moreover, a waiver is the appropriate procedural vehicle since the circumstances necessitating each waiver and the scope of each waiver request differ.

[31] 6 FCC Rcd at 5426 (footnote omitted).

[32] Bell Atlantic Reply at 6.

[33] *See* note 6, *supra*.

VI. ORDERING CLAUSE

18. Accordingly, pursuant to the authority contained in Sections 0.91(a) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 (a) and 0.291, IT IS ORDERED that the petition for waiver filed April 3, 1992 by Bell Atlantic IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-433

In re Applications of

B&G BROADCASTING, INC. File No. BPH-891220MH

RAY EDMUND PRESTON, II File No. BPH-891220MI

For Construction Permit for
New FM Station, Channel 234C3,
Paintsville, Kentucky

Appearances

John H. Midlen, Jr., Esq., and *Gregory H. Guillot, Esq.*, on behalf of B&G Broadcasting, Inc.; and *Stanley G. Emert, Esq.*, on behalf of Ray Edmund Preston, II.

DECISION

Adopted: July 20, 1992; Released: August 6, 1992

By the Review Board: BLUMENTHAL, ESBENSEN, and GREENE.

Board Member ESBENSEN:

1. The Review Board has before it the *Initial Decision*, 7 FCC Rcd 2472 (1992) (I.D.), of Administrative Law Judge John M. Frysiak (ALJ), as well as exceptions and replies thereto filed by B&G Broadcasting, Inc. (B&G), and Ray Edmund Preston, II (Preston). Neither party has requested oral argument before the Board.

2. This proceeding was heard solely on the "standard comparative" issue, *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*1965 Policy Statement)*, and B&G was declared the winner below.

B&G BROADCASTING

3. The ALJ determined that B&G is a Kentucky corporation consisting of 100% voting stock owned solely by its two shareholders (who are also Officers and Directors), Alan Burton (50%) and William D. Gibson (50%). B&G was formed by these individuals in 1983 for the purpose of acquiring and operating daytime-only standard broadcast station, WKLW, in Paintsville, Kentucky. B&G acquired WKLW in December, 1984, commenced operations in March, 1985, and has owned and operated WKLW continuously since that time. B&G Exh. 3, p. 1; I.D., paras. 12-13.

4. Burton has served as General Manager of WKLW since 1985, as well as President and Director of B&G. Except for a five-year period between 1975 and 1980, when he lived in Pikeville, Kentucky, Burton has resided in Paintsville, or within the primary service area of B&G's proposed station, for his entire life (41 years). In 1981, Burton moved to his current residence at Paradise Acres, in Hager Hill, Kentucky (within the primary service area of B&G's proposed station). Burton plans to continue to reside at this address for the foreseeable future whether or not B&G is awarded a construction permit for its proposed station. I.D., paras. 21, 25. Burton will serve as the full-time General Manager of B&G's proposed FM station. In this position, he will oversee daily station operations and will be responsible for overall station management. Burton also will make final decisions on major expenditures, and will be responsible for implementing the station's Equal Opportunity Program. *Id.*, at para. 17. The ALJ also determined that Burton "is and/or has been active" in civic and professional organizations in Paintsville and the proposed service area (since 1986). *Id.*, at para. 30.

5. Gibson currently resides in Texas, and never has worked at WKLW. (Tr. 100, 117, 119); he receives no income from WKLW or B&G (Tr. 117, 122). Nevertheless, Gibson and Burton maintain frequent contact by telephone, and Burton keeps Gibson informed regarding WKLW's operations (Tr. 83, 121). Burton also discusses all major financial expenditures with Gibson (Tr. 86). Gibson visits WKLW several times per year; and, since B&G's incorporation, has attended each of B&G's annual shareholders' meetings. Tr. 83-85, 121, 127-128; I.D., paras. 12-13. Gibson was born in Martin, and raised in McDowell, Kentucky (both of which are within the primary service area of B&G's proposed FM station). Gibson resided in Floyd County from his birth, in 1946, through the end of 1965, at which time he joined the United States Navy. During his tenure with the Navy, Gibson's legal residence continued to be in Floyd County, until the beginning of 1969, when he married and moved to Charleston, South Carolina. Following his honorable discharge from the Navy in November, 1969, Gibson moved to Paintsville, Kentucky, where he remained a resident until the beginning of 1976. Since that time, Gibson has lived outside the service area. I.D., para. 23.

6. If successful here, however, Gibson claims that he will serve full-time as Chief Engineer and Program Director of B&G's proposed new FM station. He will be in charge of all engineering and technical aspects of station operation, make decisions regarding station programming, and oversee on-air talent. Tr. 140, 141; I.D., para. 18. To effectuate his integration proposal, Gibson has pledged on the record to terminate his present employment and relocate to an address within the service area of B&G's proposed station. Gibson has notified his present employer of his intentions in this regard, and has received written confirmation therefrom that his intentions are understood (B&G Exh. 4, p. 2). Gibson already frequents Paintsville, visiting the community and its surrounding area approximately four to five times per year (*Id.*; Tr. 85). He has also pledged to discontinue any and all outside consulting services which would detract from his ability to effectuate his full-time integration commitment, upon the commencement of FM operation. I.D., paras. 20-21.

7. The ALJ determined that Burton has extensive broadcast experience dating from 1966 (as announcer, program director, in production, and as general manager). I.D., paras. 24-25. Gibson was similarly found to have such experience dating from 1963 (as announcer, sales manager, and chief engineer). I.D., paras. 26-27. B&G also received comparative credit for its proposal to install auxiliary power. I.D., para. 32.

8. B&G further sought, and received, a "daytimer-preference" based upon its ownership and operation of standard broadcast daytime-only station WKLW. The ALJ determined that the station is authorized by the Commission to operate on 600 kHz, at Paintsville, with a nominal power of 5.0 kilowatts daytime, .5 kilowatts pre-sunrise, and 43 watts at night. The FM channel sought here is in the same community in which daytime-only station WKLW is licensed. B&G has owned and operated WKLW continuously for more than three years prior to the filing of its FM application herein, and has owned and operated WKLW continuously since that time. B&G has pledged to divest WKLW within three years following the commencement date of FM operations, a pledge it tendered to the Commission contemporaneously with the filing of its application. Finally, Burton, B&G's 50% shareholder, President, and Director, has spent in excess of 20 hours per week participating in the management of WKLW during the three-year period preceding the filing of B&G's application, and B&G has proposed to integrate both Burton and Gibson, full-time, into the management of B&G's proposed FM station. I.D., para. 31.

RAY E. PRESTON, II

9. Preston is a sole proprietorship, with no attributable media interests. Preston proposes to be the General Manager of the station, and claims that he will control all aspects of the station, including (but not limited to) programming, sales, employee hiring and firing, business, policy making and implementation, and community relations. Preston claims that he will resign from any other employment at least 60 days prior to going on the air with the station. I.D., paras. 33-36.

10. Preston is, and has been for 44 years (his entire life), a resident of the service area, residing in Turner Branch, Kentucky, for the last 20 years (Turner Branch is located just outside the city limits of Paintsville). He claims credit for civic activities (along with his "local residence") arising from serving three consecutive terms in the Kentucky Legislature (from 1985-1990), where he was a Representative of the 97th District (which includes Paintsville). In 1970, he was elected as a member of the Johnson County (Paintsville) Fiscal court as Magistrate, and served there until 1973. I.D., paras. 37, 41.

11. Preston's other claimed civic activities include membership in the Paintsville Jaycees (for approximately five years from the late 1970's to the early 1980's). From about 1970 until about 1983, he was involved as a coach and director of a youth baseball program in Paintsville. From 1989 until the present, he has been involved as a founding participant in "Project 2000," an organization of community business leaders working to create job opportunities in Paintsville and the area. In either 1962 or 1964, he became a "Kentucky Colonel," awarded to him based on his service to the community. In the early 1970's, he was one of a two person committee who helped bring a "professional" baseball franchise to Paintsville. I.D., paras. 43-47.

12. Preston also claims credit for past broadcast experience. He worked from 1981 to 1985 for WSIP AM/FM in Paintsville. During part of that time he was its News Director. Additionally, he worked periodically and part-time for WSIP from 1962 to 1976, and performed services relating to news, sports, and community events. Beginning in 1969 he has also worked periodically and part-time for WKLW-AM in Paintsville, where he performed on-air services relating to news and information, sports, and community events. Preston also received credit for his auxiliary power proposal. I.D., paras. 48-50.

EXCEPTIONS

13. The ALJ determined that both remaining applicants were equal with respect to diversification of media interests, comparative coverage, and proposals to furnish auxiliary power, and neither party has excepted to these conclusions.[1]

14. Preston, in salient part, argues that B&G cannot receive credit for Gibson's integration proposal because Gibson did not timely pledge to terminate his present employment; and that even if he had made a timely pledge, he cannot be Program Director because "a programming decision had clearly been made" to simulcast the AM station. Preston Exceptions, para. 24. Preston's principal exception, however, is that B&G is not entitled to the "daytimer preference."

15. As to Preston, B&G renews the same exception arguments it made before the ALJ:

> [B&G] would have Preston denied any integration credit. [B&G] maintains that Preston's proposal to integrate should not be ascribed any weight because it perceives him to be an inveterate liar. [B&G] points to three instances where Preston's truthfulness came into question: (1) In his Exhibit 1, Preston averred that he was presently a self-employed leasing agent for oil and gas drilling and exploration; but at hearing testified that this statement was not true as of the date it was made; (2) Preston certified site availability upon assurances of his grandmother; but the letter of assurance was signed by his mother and he was generally confused as to the site's ownership, both at the deposition and at hearing; (3) In his Exhibit I, Preston averred that he was presently an employee of WKLW(AM), but gave conflicting statements both at deposition and hearing.

I.D., para. 62. B&G now also argues that Preston's proposal to be General Manager is "indefinite" because Preston did not pledge to work hours "devoted strictly, or even at all, to managerial duties." B&G Exceptions, p. 12.

DISCUSSION

16. There is no question that B&G is entitled to the "daytimer preference" envisioned by the Commission in its *Increased Availability of FM Broadcast Assignments*, 101 FCC 2d 638 (1985), *modified*, 59 RR 2d 1221 (1986), *recon. denied*, 2 FCC Rcd 481 (1987), *aff'd*, 822 F.2d 277 (2nd Cir. 1987). The ALJ properly set forth the operative criteria (*see* para. 8, *supra*),[2] and just as properly awarded the mandated preference to B&G. Thus, B&G is entitled to a comparative preference which elevates broadcast experience to the same relative strength as a minority preference or local residence. *Bible Broadcasting Network, Inc.*, 7 FCC Rcd 432, 436 (Rev. Bd. 1992), *aff'd*, FCC 92-307, adopted July 1, 1992.

17. Preston's argument in opposition that B&G is not, "as a matter of law," entitled to a "daytimer preference," because it is already authorized to operate with *43 watts*

during nighttime hours, merely argues against Commission policy. *See* Preston Exceptions, para. 13. He therefore errs in his claim that "[t]here is no statement in any part of the Commission's decisions relating to the AM daytime preference possibility that mandates that an AM [station] which broadcasts with less than 250 watts at night is, as a matter of law, a daytimer for preference purposes." *Id.*, at para. 16. In fact, in its *Reconsideration Order*, 59 RR 2d 1221, 1227 n.27, the Commission stated (emphasis added):

> We note that as a result of our separate action in the *Report and Order in MM Docket No. 84-281, supra* n. 21, many daytime-only broadcasters on the foreign clear channels have been authorized to operate with some level of limited nighttime power. Where the nighttime authority utilized is less than 250 watts of power, such nighttime service is given secondary status. Operating at this level is below the normal minimum nighttime power and the operator is forced to broadcast without signal protections. *In these circumstances, we believe it to be in the public interest that these broadcasters continue to be treated as daytime-only licensees for these purposes and be afforded the same upgraded enhancement credit.* Accordingly, we have concluded that any daytime-only station that, as a result of MM Docket No. 84-281, has accepted authorization to operate at less than 250 watts nighttime power will be eligible for grant of the special consideration. Licensees operating at night with 250 watts or more are full-time stations entitled to full-time protection and thus, will not be entitled to the credit.

18. As to Preston's claim that Gibson did not properly pledge to leave his present employment to effectuate his proposed integration at Paintsville, we note (as B&G points out in its Reply at p. 5) that Gibson did set forth his pledge to terminate existing employment in B&G's Direct Case Exhibits 4 and 6. Nonetheless, Preston argues, the applicants were here required to set forth their proposed integration *at the time* they filed their respective applications: as a result, "it only follows that Gibson [was] required to state how he will *effectuate* that proposal" in the application itself. Preston Exceptions, para. 19; emphasis added.

19. We must disagree. In its *Revision of Application for Construction Permit*, 4 FCC Rcd 3853 (1989), the Commission amended Section IV of FCC Form 301, redesignating that Section as Section IV-A, and adding a new Section IV-B "Integration Statement" requiring applicants to respond to the following:

> a. List each principal of the applicant who, in the event of a grant of the application on a comparative basis proposes to participate in the management of the proposed facility and, with respect to each such principal, state whether he or she will work full-time (minimum 40 hours per week) or part-time (minimum 20 hours per week) and briefly describe the proposed position and duties.

The rationale for including this information was explicated by the Commission (4 FCC Rcd at 3860; footnotes omitted; emphasis added):

> In 1981, we removed from Form 301 the sole question that generally elicited the applicant's proposal for integrating its owners into management of the station. In our current comparative process, integration is a significant and sometimes the key factor in evaluating the relative merits of the applications. Yet, applicants are often left guessing as to the details of each others' integration proposals until well into the comparative hearing. Consequently, parties are unable to assess the merits of a key component of an opponent's application until late in the comparative process. This makes parties engaged in early settlement discussions more vulnerable to pressure from non *bona fide* applicants.
>
> Moreover, under our current reporting requirements, we are generally not able to detect cases in which parties have filed contingent integration proposals, *i.e.*, numerous applications that are founded on full time integration of the *same owners* in the management of *numerous stations*. We have traditionally required an unequivocal promise of ownership participation to merit integration credit; and accordingly, we have consistently denied integration credit for contingent integration proposals. Consequently, parties relying on contingent integration proposals are entitled to no integration preference. Yet, we now provide no means early in the process for parties to discover this information.
>
> To remedy this, we are amending Section IV of Form 301 to require that applicants describe their integration proposal at least by the end of the amendment-as-of-right period. Accordingly, an applicant may disclose its integration proposal when it originally files its Form 301, but it must file its integration proposal with the Commission by the amendment-as-of-right date.
>
> * * *
>
> If an applicant fails to disclose its integration proposal by the amendment-as-of-right date, it will receive no credit for integration in the comparative hearing. *To describe their integration proposals, applicants must identify each principal who will participate in the management of the proposed facility, his or her position, duties and hours, and for each principal whether a qualitative credit will be claimed for minority status, past local residence, female status, broadcast experience or civic activity. Furthermore, any claim to "daytimer" preference must be stated at the same time.*

Notably absent is any requirement that an applicant specifically state in the application itself the *manner* in which the termination pledge will be *effectuated*. Rather, the Commission has very recently (February 20, 1992) stated:

> Thus, for evidentiary hearings held in the future, we will make no inference as to . . . existing employment, and we will discredit his integration proposal *unless there is an explicit pledge in the hearing record* that that owner will terminate or reduce such employment.

Coastal Broadcasting Partners, 7 FCC Rcd 1432, 1435 (1992) (emphasis added). Here, Gibson set forth with particularity in B&G's direct case exhibits how he intends to effectuate his proposal by entirely eliminating any other employment interests. Thus, the "hearing record" here fully comports with *Coastal*. And, when an applicant "sets forth a specific integration proposal; the applicant adheres to that proposal; and there is reasonable assurance that the plan will be carried out," *Royce International Broadcasting*, 5 FCC Rcd 7063 (1990), *recon. denied*, 6 FCC Rcd 2601 (1991), integration credit will be awarded. We find nothing in the record to indicate that Gibson cannot, or will not, adhere to these *Royce* criteria, and, in light of the foregoing, we hold that Gibson's effectuation pledge made in B&G's direct case exhibits is sufficient. Thus, Gibson will receive full integration credit here.

20. As to B&G's Exceptions, we agree with the ALJ's disposition (I.D., para. 63):

> The record does not support the competing applicant's charges. (1) Self-employment: The fact that Preston began to work for Consolidated Health Systems about the time he signed his declaration on June 10, 1991, does not prove that he was no longer in the oil and gas drilling and exploration business. (2) Preston may have been confused as to whether his mother or grandmother owned his proposed transmitter site, but there is no reason for him to have lied. There is no site availability issue and no question that he has assurance of site availability. (3) Employment at WKLW was never expressly terminated. Preston worked there on an *ad hoc* basis. Preston claims, and the record seems to bear him out that he was still owed some money for services rendered. Preston has not claimed credit for broadcast experience for any time that he was not broadcasting.

In essence, B&G would have the Board absolutely disqualify Preston for his alleged "lack of candor" and lack of "reasonable assurance" of his transmitter site, absent specific basic qualifying issues. However, B&G never attempted to have the issues enlarged in this proceeding as to Preston's qualifications before the ALJ. Any such attempt now before the Board would fail as grossly untimely because it would not be supported by newly-discovered evidence which could not have been discovered earlier. In fact, the evidence relied upon by B&G arose during the hearing and/or at deposition many months ago. And, in any event, the evidence does not now raise substantial and material questions of fact, or of probable decisional significance. *See* 47 CFR § 1.229(c); *Omaha TV 15, Inc.*, 4 FCC Rcd 730 (1988); *Shirley Marchant*, 4 FCC Rcd 5241 (Rev. Bd. 1989); *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5194 n.8 (1991).

CONCLUSION

21. All decisionally-significant exceptions having been considered, the Board determines that B&G is entitled to full 100% integration credit and qualifies for a "daytimer preference." In light of Preston's explicit concession in his Exceptions that "*[o]nly under the circumstances where B&G is awarded the [daytimer] preference... is Preston's application inferior to B&G's*" (*see* Preston Exceptions, para. 30; emphasis added), we affirm the ALJ's award of the construction permit to B&G.

22. ACCORDINGLY, IT IS ORDERED, That the application of Ray Edmund Preston, II (File No. BPH-891220MI) IS DENIED, and the application of B&G Broadcasting, Inc. (File No. BPH-891220MH) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] With respect to B&G's integration proposal the ALJ concluded that (I.D., paras. 58-60):

> B&G is entitled to 100 percent quantitative integration credit for the integration proposals of Alan Burton and William D. Gibson. Each will serve in a full time managerial capacity at B&G's proposed station. Nothing in the record undermines either of their commitments, or their abilities to effectuate them.
>
> B&G's quantitative integration is enhanced substantially by Burton's 50 percent full local residence credit and Gibson's 50 percent 23 year service area, 6 year local, and proposed future service area residence. B&G's local and service area residence credit is further enhanced moderately by Burton's involvement in civic activities within the community of license.
>
> B&G's proposal also is enhanced substantially by extensive past broadcast experience of each of its principals. Moreover, B&G has met each one of the Commission's requirements for the daytimer preference claimed by the applicant . . . . Accordingly, pursuant to the policies of the Commission, B&G's past broadcast experience is upgraded so as to be equal to the enhancement value of local residence or minority ownership.

[2] The ALJ set forth the following criteria that must be met to merit a "daytimer preference." I.D., n.3:

> (i) The FM allotment applied for must be in the same community as the daytime-only station;
>
> (ii) The applicant must have owned the daytime-only facility for three continuous years prior to the filing of its FM application;
>
> (iii) The daytime-only applicant must pledge to divest the AM facility within three years after the commencement date of FM operations. This pledge is required to be made within 30 days after designation of the FM application for hearing;
>
> (iv) Members of the applicant entity holding cognizable ownership interests must have spent more than 20 hours per week (either individually on or in the aggregate) participating in the management of the daytime-only facility during the three year period prior to filing the FM application; and,

(v) The applicant must propose to be integrated in the operation of the FM station.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 27, 1992

Advisory Committee on Advanced Television
Service Implementation Subcommittee Meeting

August 25, 1992
10:30 A.M.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

AB The agenda for the meeting will consist of:

1. Introduction
2. Minutes of Last Meeting
3. Report of Working Party 1
   Policy and Regulation
4. Report of Working Party 2
   Transition Scenarios
5. Scheduling of Final Report Submissions
6. General Discussion
7. Other Business
8. Date and Location of Next Meeting
9. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Implementation Subcommittee Chairs.

Any questions regarding this meeting should be directed to George Vradenburg III at (310) 203-1334, Dr. James J. Tietjen at (609) 734-2237, or Gina Harrison at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 4212
Tariff F.C.C. No. 12

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

ORDER

Adopted: July 24, 1992; Released: July 24, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 22, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective July 27, 1992. This transmittal was originally scheduled to become effective on July 6, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] This filing generally modifies the monthly charges in the rate schedules applicable under AT&T's Virtual Telecommunications Network Service (VTNS) Option 58 and also introduces additional charges for new locations beyond the first 400 locations not included in the customer's initial design.

2. Petitions to reject or, in the alternative, suspend and investigate Transmittal No. 4212 were filed by Telegroup, Inc, the Interexchange Resellers Association, and "The Petitioners."[2] On July 9, 1992, AT&T filed a reply to these petitions. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4212 and the petitions referenced above. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.[3]

3. Accordingly, IT IS ORDERED that the petitions to reject AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 4212, filed by the petitioners referenced in paragraph 2, *supra*, are DENIED.

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880 (*IXC Order*), *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further reconsideration*, 7 FCC Rcd 2677 (1992).

[2] "The Petitioners" include Affinity Network, Inc., Business Choice Network, Communications Buying Group, NOS Communications, Inc., the Furst Group, and VNI Communications, Incorporated.

[3] We note with concern, however, the allegations made by the petitioners in their pleadings and in informal contacts with the Common Carrier Bureau that AT&T is engaging in a variety of activities designed to prevent or impede resellers from obtaining Tariff 12 services. These allegations are also the subject of formal complaints before the Commission. We intend to resolve expeditiously the issues raised by these allegations in the context of those proceedings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Midyear 1986 Access Tariff Filings) Transmittal No. 56

Ameritech Operating Companies
Tariff F.C.C. No. 2

ORDER

Adopted: July 24, 1992; Released: July 27, 1992

By the Chief, Common Carrier Bureau:

1. The Ameritech Operating Companies (Ameritech) filed a petition for continuation of waiver[1] of that portion of the Commission's *December 19 Order*,[2] directing local exchange carriers (LECs) to provide originating WATS access lines (WALs) with Feature Group A (FGA) and Feature Group B (FGB) services. A number of LECs, including Ameritech, previously were granted waivers of this requirement.[3] These waivers are scheduled to expire on August 1, 1992. Ameritech's waiver petition is unopposed.

2. In general, Ameritech states that in order to provide WALs with FGA and FGB it would need to modify its billing systems. It asserts that there is no demand for the service and that it would be unreasonable to incur the cost and divert resources necessary to offer a service that no interexchange carrier (IXC) will order. Ameritech states that it will continue to offer a free service arrangement that enables IXCs to provide outWATs service to customers served by nonconforming offices using WATS access line extensions (WALEs) to connect those customers to offices with equal access capability.

3. The pending waiver request filed by Ameritech is similar to those filed by LECs over the last four years. As there continues to be no demand for the service at issue and the costs of providing the service are not insignificant, we conclude that a further two-year extension of the request is warranted on condition that these carriers continue to offer IXCs free WALEs where necessary.[4]

4. Accordingly, IT IS ORDERED that the petition for continuation of waiver filed by Ameritech Operating Companies IS GRANTED, to the extent specified herein.

5. IT IS FURTHER ORDERED that all similarly situated LECs ARE ALSO GRANTED an extension of their waivers to the extent specified herein, and that the waivers granted by this Order SHALL EXPIRE on August 1, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] Petition for Continuation of Waiver, filed by Ameritech Operating Companies, July 9, 1992.

[2] Midyear 1986 Access Tariff Filings, 1 FCC Rcd 1247 (1986) (*December 19 Order*).

[3] *See e.g.*, Ameritech Operating Companies *et. al.*, Tariff F.C.C. No. 2 Petitions for Continuation of Waiver, 5 FCC Rcd 4840 (Com.Car.Bur. 1990) (waiver granted to the Ameritech Operating Companies, Pacific Bell, and the BellSouth Telephone Companies).

[4] We note that the treatment of FGA and FGB, and the necessity for these waivers, may be affected by action in the Commission's transport rate structure and pricing proceeding. Transport Rate and Structure Pricing, CC Docket No. 91-213, Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 5341 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell
Telephone Company Transmittal Nos. 2204, 2212
Tariffs F.C.C. Nos. 68 and 73

ORDER

Adopted: July 24, 1992; Released: July 24, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 11, 1992, Southwestern Bell Telephone Company (SWBT) filed Transmittal No. 2204 to modify the verification guidelines for determining Percent of Interstate Use (PIU) factors provided to SWBT by access customers when Automatic Number Identification (ANI) is not available. SWBT uses these factors to allocate switched traffic between interstate and intrastate jurisdictions.[1] The tariff is scheduled to take effect on July 26, 1992.

2. On June 18, 1992, WilTel, Inc. (WilTel) and the Texas Association of Long Distance Telephone Companies, Advanced Telecommunications Corporation and LDDS Communications (together referred to as IX Carriers) filed petitions to reject or, in the alternative, suspend and investigate Transmittal No. 2204. WilTel argues that the tariff imposes on SWBT customers (primarily interexchange carriers (IXCs)) unreasonable recordkeeping requirements[2] and provides for discriminatory and arbitrary selection of customers chosen for a PIU audit.[3] WilTel further argues that the audit procedures designed to verify customer-provided PIU factors unreasonably burden customers.[4]

3. The IX Carriers argue that the tariff violates Commission policy by imposing unnecessary and undue financial and administrative burdens on IXCs. In particular, these petitioners claim that the tariff permits audits too frequently,[5] requires unnecessary record retention,[6] requires the unnecessary disclosure of sensitive business information,[7] requires audits at inconvenient locations,[8] permits service cut-off or refusal to provide new service on an arbitrary basis,[9] and requires arbitration in a manner that deprives IXCs of their right to petition the Commission for relief.[10]

4. On June 29, 1992, SWBT filed its reply. SWBT maintains that the offering is reasonable and that the reporting and verification requirements are consistent with Commission policy regarding PIUs.[11]

5. The Common Carrier Bureau has reviewed SWBT's Transmittal 2204 and all associated pleadings and submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

6. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate Southwestern Bell Telephone Company Tariff F.C.C. Nos. 68 and 73, Transmittal No. 2204, filed by WiltTel, Inc. and jointly by the Texas Association of Long Distance Telephone Companies, Advanced Telecommunications Corporation and LDDS Communications, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] On July 20, 1992, SWBT filed Transmittal No. 2212 to further modify Transmittal No. 2204.
[2] WilTel Petition at 2.
[3] *Id.* at 2-3.
[4] *Id.* at 3-6.
[5] IX Carriers Petition at 4.
[6] *Id.* at 5.
[7] *Id.*
[8] *Id.* at 6.
[9] *Id.* at 6-7.
[10] *Id.* at 6.

[11] *See* In the Matter of Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, 4 FCC Rcd 8448 (1989) (*Jurisdictional Measurement Order)* (adopting a Federal-State Joint Board recommendation to resolve certain longstanding problems relating to the measurement and verification of interstate and intrastate access charge billing for cost separation purposes. In the Matter of Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, 4 FCC Rcd 1966 (Fed.-St. Jt. Bd. 1989) (*Recommended Jurisdictional Measurement Order)*).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 28, 1992

AAD 92-66

NEMONT TELEPHONE & VALLEY RURAL TELEPHONE PETITION FOR WAIVER OF THE COMMISSION'S RULES REGARDING STUDY AREA PART 36, SECTIONS 36.125(f); 36.154(e)(1) AND (2)

On July 15, 1992, the Nemont Telephone Cooperative (Nemont), and Valley Rural Telephone Cooperative Association, Inc. (Valley Rural) jointly filed a petition for waiver regarding the definition of "study area" contained in the Appendix-Glossary of Part 36, and of allocation factor calculations in Sections 36.154(e)(1) and (2) and 36.125(f) of the Commission's rules to allow the merger of these two companies into a single study area. This consolidation would become effective January 1, 1993.

Parties may file comments on this petition no later than **August 21, 1992**. Replies should be filed by **September 7, 1992**. Comments should reference AAD 92-66. A copy of each pleading should be sent to Gary Seigel, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to Downtown Copy Center (DCC), 1919 M Street, N.W., Suite 246, Washington, D.C. 20554, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W. Room 812, Washington D.C.; copies are also available from DCC.

For further information contact Gary Seigel at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policies and Rules Pertaining to the Equal Access Obligations of Cellular Carriers — RM-8012

Motion for Extension of Time

ORDER

Adopted: July 27, 1992; Released: July 28, 1992

COMMENTS: September 2, 1992
REPLY COMMENTS: October 1, 1992

By the Acting Deputy Chief (Policy), Common Carrier Bureau:

1. On June 2, 1992, a petition for rulemaking was filed by MCI Telecommunications Corporation (MCI's petition), seeking a Commission requirement that all cellular licensees interconnect with interexchange carriers via uniform, nationwide, cellular equal access policies and procedures. The Commission on June 10, 1992, released a Public Notice (DA 92-745) directing that comments on MCI's petition should be filed by August 3, 1992.

2. On July 15, 1992, McCaw Cellular Communications, Inc. (McCaw) filed a motion for extension of time in which to submit comments regarding MCI's petition. McCaw states that, in view of the number of important and extensive ongoing proceedings before the Commission affecting cellular service providers, it has not yet had a full opportunity for review of the issues raised by the MCI petition. McCaw seeks additional time to consider the technical and policy issues involved. McCaw requests that the date for filing comments be extended by 30 days, to enable it to provide the Commission with a more complete record. On July 21, 1992, MCI filed comments stating that it does not oppose McCaw's motion.

3. The Common Carrier Bureau has reviewed McCaw's request for extension of time and has determined that good cause has been shown to grant all interested parties additional time, until September 2, 1992, to file comments and until October 1, 1992, to file reply comments in the above-captioned proceeding.

4. IT IS THEREFORE ORDERED, that McCaw's motion for extension of time IS GRANTED and all interested parties have until **September 2, 1992,** to file comments and until **October 1, 1992,** to file reply comments in the above-captioned proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-167

In the Matter of

Amendment of the Amateur Radio Service Rules to Provide a Special Temporary Licensing Procedure for Visiting Foreign Amateur Operators.

NOTICE OF PROPOSED RULE MAKING

Adopted: July 24, 1992; Released: August 6, 1992

Comments Due: October 26, 1992
Reply Comments Due: November 30, 1992

By the Commission: Commissioner Quello concurring and issuing a statement.

I. INTRODUCTION

1. In this *Notice of Proposed Rule Making (Notice)*, we propose, on our own motion, to amend the amateur service rules to provide a convenient licensing procedure for foreign amateur operators visiting in our country for a short time, such as vacationers, convention delegates, meeting attendees, and tourists, who wish to operate their amateur stations while they are here. This proposal is intended to extend the amateur operator's unique ability to enhance international goodwill.[1]

II. BACKGROUND

2. Currently, there are two ways that a foreign amateur operator can be authorized to operate an amateur station in the United States. Any person, including non-citizens, who passes the necessary examinations can receive a ten-year term amateur service license. This method is generally used by non-citizens who reside permanently in the United States or who are here for a lengthy stay. Alternatively, citizens of the 76 countries whose governments have signed reciprocal operating agreements with the United States[2] may, on the basis of the amateur service licenses issued by their own countries, be issued one-year permits to operate their amateur stations while they are in the United States.[3]

3. Many visiting foreign amateur operators are ineligible for a reciprocal permit, however, because there is no reciprocal agreement between our government and theirs. Their only alternatives are to pass the examinations for a Commission-issued license before visiting the United States or during their stay here.

III. PROPOSAL

4. The objective of this rule making proposal is to devise a convenient and efficient procedure that will make it possible for a foreign amateur operator on a brief visit to the United States to operate an amateur station. We believe that a single, consecutive 60-day period of authorization will meet the time requirements typically needed by most such visitors. In order to make such operation possible, we need to (1) confirm that the person currently holds an amateur service license from the country of citizenship, (2) determine the extent of the operating privileges granted by the license, (3) make certain that the person is qualified to perform the duties of an amateur operator in the United States and that authorization is in the public interest, (4) provide the foreign amateur operator with a document attesting to the fact of qualification, and (5) record pertinent data so that we can contact the person, if necessary. The entire process would be designated as the licensing of a temporary visiting foreign amateur operator. Because of the brief period involved, the licensing procedure would have to be readily available throughout the country and would have to be completed quickly.

5. Currently, all amateur operator license examinations are administered in the private sector either in the volunteer-examiner coordinator (VEC) system or, for Novice Class operator examinations, by two volunteer examiners (VEs). Although there are no limitations on where the examinations can be administered, (VEs) may not be available in many foreign countries.[4] The VECs coordinate the efforts of the VEs in preparing, administering, and grading examinations. We believe that the most efficient means of authorizing operation by foreign visitors is found in the VEC system. In that system, thousands of examinations are given annually by VEs under the guidance of the VECs. Using the VEC system would make it possible to give foreign visitors examinations in a great many places without delay.[5] Moreover, the highly-effective procedures and methods of the VEC system can be used for licensing the temporary visiting foreign amateur operators.

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[1] See Section 97.1(e) of the Commission's Rules, 47 C.F.R. § 97.1(e).

[2] See *Public Notice*, Amateur Service Reciprocal Operating Arrangements, April 21, 1992.

[3] The statutory basis for reciprocal licensing is contained in Sections 303(l)(3) and 310(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 303(l)(3) and 310(c). Additionally, Canadian amateur operators may operate their stations in the United States under a bilateral agreement signed February 8, 1951. That agreement entered into force May 15, 1952. *See* TIAS 2508.

[4] Three VEs accredited by a VEC are required to administer the examination for a Technician, General, Advanced, or Amateur Extra Class operator license. Two unaccredited VEs may administer the examination for a Novice Class operator license. *See* Sections 97.511 and 97.513, 47 C.F.R. §§ 97.511 and 97.513.

[5] There are 18 VECs and some 20,000-30,000 accredited VEs in the United States and elsewhere. They prepare and administer well over 100,000 examinations annually to 65,000-75,000 persons.

6. *Licensing qualifications.* We must find that the person is qualified to perform properly the duties of an amateur operator in the United States and that authorization is in the public interest.[6] Under the proposed procedure, we would consider the possession of the foreign amateur service license as proof of qualification in eight of the nine operational and technical topics contained in every written examination.[7] What is not covered by the foreign license are our rules for the amateur service. There is no basis for us to conclude that the holding of a foreign license is proof of knowledge of the rules for the amateur service in the United States. We would also consider it to be in the public interest that such persons receive conditional licenses, as proposed herein, provided they meet certain other requirements discussed below.[8]

7. We propose that the VEs examine the foreign operator's amateur service license, review identification credentials, and determine the extent of the operating privileges prior to administering a twenty-question examination. The examination would be on those aspects of our rules that are most applicable to the type of operation in which the visitor plans to engage while in the United States. Without compromising the examination, the VEs would be able to explain immediately any rule that the visiting foreign operator wants clarified. The VEs could administer the same questions on the amateur service rules that already appear on the question pools maintained by the VECs. We suggest that the VECs take appropriate questions from the existing question pools to create a separate question pool. If the foreign operator passes the examination, the VEs would record the person's name, addresses while in the United States, the foreign amateur station call sign, and the privileges authorized by the foreign license. They would also issue a Certificate of Successful Completion of Examination (CSCE) to the foreign operator which would serve as proof of the foreign operator's conditional license authorizing operation in the United States.[9]

8. Upon notification by the VEs of the completion of the transaction, the coordinating VEC would add the name and United States addresses of the temporary foreign visiting operator to a data base that is maintained and forwarded to the Commission on a regular basis.[10] Upon receiving a CSCE from the VEs, the temporary visiting foreign operator would be authorized to begin a single, consecutive operating period, not to exceed 60 days, at any time within 365 days of the issuance of the CSCE.[11] We believe that the entire process is one that is simple and convenient for the foreign operator, the VECs and VEs, and the Commission. If harmful interference or some other situation arises involving any of the visitors, we would be able to contact them quickly.[12] We also propose that the license be conditioned on our authority, in our discretion, to modify, suspend, or cancel the operating privileges of a temporary visiting foreign amateur operator. Because we are proposing to permit the stations of amateur operators from foreign countries that do not have a reciprocal agreement with the United States to transmit while in the United States, we specifically invite comments from other government agencies as well as from the amateur community concerning any potential national security implications of this proposal.

9. *Operator privileges.* Because there is great diversity in the privileges afforded to amateur operators by the various countries, it is not feasible to equate directly the classes of amateur operator licenses issued by other countries with a Commission-issued amateur operator license. As a practical matter, and in fairness to all, Section 97.107 of the Commission's Rules, 47 C.F.R. § 97.107, authorizes a Canadian licensee or a reciprocal permittee the same privileges in the United States as those authorized by his/her own government, but not to exceed those granted to our most privileged licensees.[13] We propose to add the temporary visiting foreign amateur operator to this rule. This approach leaves the issue of specific operator restrictions entirely to the country that issued the license. It does not obligate us to question the basis for any operating constraint that is imposed by the licensing country. We also propose to include the present limitation that any person who holds a Commission-issued operator/primary station license is authorized only the privileges of that license.

10. *Reimbursement for expenses.* We propose that Section 97.527(a) of our Rules, 47 C.F.R. § 97.527(a), which authorizes VEs and VECs to be reimbursed for out-of-pocket expenses incurred in preparing, processing, administering, or coordinating examinations for a Technician, General,

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[6] *See* Sections 303(l)(1), 308, and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 303(l)(1), 308, and 309. *See also* international Radio Regulation, Number 2736, Geneva (1979).

[7] The examination topics are listed in Section 97.503 of the Commission's Rules, 47 C.F.R. § 97.503(c). They are (1) FCC Rules for the amateur radio services, (2) amateur station operating procedures, (3) radio wave propagation characteristics of amateur service frequency bands, (4) amateur radio practices, (5) electrical principles as applied to amateur station equipment, (6) amateur station equipment circuit components, (7) practical circuits employed in amateur station equipment, (8) signals and emissions transmitted by amateur stations, and (9) amateur station antennas and feed lines. We do not suggest that examination credit toward our ten-year term licenses be given to holders of licenses from foreign countries.

[8] This procedure is analogous to other licensing procedures for private radio licenses. *See, e.g., Amendment of Part 90 of the Commission's Rules*, 4 FCC Rcd 8280 (1989), *recon. pending; Amendment of Parts 1, 2, and 90 of the Commission's Rules*, 81 FCC 2d 373 (1980), *aff'd. sub nom. Telocator Network of America v. FCC*, 665 F.2d 394 (D.C. Cir. 1981).

[9] The VEs currently issue CSCEs for examination elements that the examinee passes.

[10] The VECs are experienced in maintaining data bases using modern data processing. They currently maintain a data base of Technician Operator Class licensees who have passed a telegraphy examination.

[11] For those persons who visit the United States several times a year, the process would have to be repeated for each visit. The temporary visiting foreign operator, therefore, could obtain authority for additional single, consecutive operating periods.

[12] For station identification purposes, we will revise our *Public Notice*, Amateur Service Reciprocal Operating Arrangements, to reflect station location letter-numeral designators that will distinguish the stations of temporary visiting foreign amateur operators from those stations operating under the authority of a reciprocal permit for alien amateur licensee.

[13] The Amateur Extra Class operator license is the highest class of license in our five-tier license structure.

Advanced, or Amateur Extra operator license be expanded to include examination for certification of a temporary visiting foreign amateur operator.[14]

IV. CONCLUSION

11. We believe that it is in the public interest to provide a procedure that allows temporary visiting foreign amateur operators to operate their stations while in the United States. This will particularly benefit tourists who come to the United States on relatively short notice. Additionally, we believe that the proposed procedure will enhance international goodwill. Further, the proposal, as outlined above, would result in no cost to the Commission. The system would be administered and coordinated by the VEs and VECs who can be reimbursed for their out-of-pocket expenses. We invite all interested parties to comment on the proposed rules.

V. PROCEDURAL MATTERS

Ex Parte Rules - Non-Restricted Proceeding

12. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Regulatory Flexibility Act

13. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because, if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The amateur stations of temporary visiting foreign amateur operators would not be authorized to transmit any communications the purpose of which is to facilitate the business or commercial affairs of any party. *See* 47 C.F.R. § 97.113(a). The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1981).

Comment Dates

14. Authority for issuance of this *Notice* is contained in Sections 4(f)(4)(J), 301, 303(l)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(f)(4)(J), 301, 303(l)(1) and (r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **October 26, 1992,** and reply comments on or before **November 30, 1992.** To file formally in this proceeding, you must file an original and four copies of all comments, and reply comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

15. For further information, call Maurice J. DePont, Private Radio Bureau, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. Section 97.5 is amended by adding new paragraph (f) as follows:

§ 97.5 Station license required.

* * * * *

(f) The amateur station of a person licensed as a temporary visiting foreign amateur operator is authorized to transmit from a geographic location within 50 km of the Earth's surface where the amateur service is regulated by the FCC.

3. Section 97.7 is amended by adding a new paragraph (d) as follows:

§ 97.7 Control operator required.

* * * * *

(d) A CSCE indicating the holder passed examination Element 5 within the previous 365 days and is licensed as a temporary visiting foreign amateur operator.

4. Section 97.107 is amended by revising paragraph (c) and redesignating it as paragraph (d), and by adding a new paragraph (c) to read as follows:

§ 97.107 Alien control operator privileges.

[14] The 1992 maximum reimbursement fee is $5.44.

* * * * *

(c) The privileges available to a control operator licensed as a temporary visiting foreign amateur operator are:

(1) The operating terms and conditions of the amateur service license issued by the operator's government;

(2) The applicable provisions of the FCC Rules, but not to exceed the control operator privileges of an FCC-issued Amateur Extra Class operator license; or

(3) None, if the temporary visiting foreign amateur operator also holds an FCC-issued operator/primary station license, in which case the privileges of the FCC-issued license apply.

(d) At any time, the FCC may, in its discretion, modify, suspend, or cancel the amateur service privileges within or over any area where radio services are regulated by the FCC of any Canadian amateur service licensee, alien reciprocal permittee, or temporary visiting foreign amateur operator.

5. Section 97.119(f) is revised to read as follows:

§ 97.119 Station identification.

* * * * *

(f) When the station is transmitting under the authority of a reciprocal permit for alien amateur licensee, or under the authority of § 97.5(f) of this Part pertaining to a temporary visiting foreign amateur operator, an indicator consisting of the appropriate letter-numeral designating the station location must be included before the call sign issued to the station by the licensing country. When the station is transmitting under the authority of an amateur service license issued by the Government of Canada, a station location indicator must be included after the call sign. At least once during each intercommunication, the identification announcement must include the geographical location as nearly as possible by city and state, commonwealth or possession.

6. Section 97.503 is amended by adding a new paragraph (b)(6) as follows:

§ 97.503 Element standards.

* * * * *

(b)* * *

(6) Element 5: 20 questions concerning the FCC rules for the amateur radio services as related to the privileges of a temporary visiting foreign amateur operator. The minimum passing score is 18 questions answered correctly.

* * * * *

7. Section 97.527(a) is revised to read as follows:

§ 97.527 Reimbursement for expenses.

(a) VEs and VECs may be reimbursed by examinees for out-of pocket expenses incurred in preparing, processing, administering, or coordinating an examination for a Technician, General, Advanced, or Amateur Extra Class operator license, and for an examination for licensing as a temporary visiting foreign amateur operator.

* * * * *

8. Part 97, Subpart F, is amended by adding a new Section 97.529 as follows:

§ 97.529 Licensing of a temporary visiting foreign amateur operator.

A person may be licensed as a temporary visiting foreign amateur operator for a single, consecutive period, not to exceed 60 days, under the following procedure:

(a) The person must pass an Element 5 examination administered at an examination session coordinated by a VEC.

(b) Element 5 must be administered by 3 administering VEs, each of whom must hold an Amateur Extra Class operator license.

(c) The administering VEs must issue a CSCE for a single, consecutive period, showing the starting and ending dates during the 365 days following its issuance, to an examinee who scores a passing grade on examination Element 5 and who:

(1) Is not a citizen of the United States;

(2) Holds an amateur service license issued to the examinee by a foreign country other than Canada;

(3) Does not hold an amateur service license issued by any United States Government agency;

(4) Is a citizen of the same country that issued the amateur service license.

(d) Within 10 days of the administration of a successful Element 5 examination, the administering VEs must submit to the coordinating VEC:

(1) The examinee's name;

(2) The examinee's station call sign;

(3) The control operator privileges authorized to the examinee by the foreign license held;

(4) The addresses in the United States where the examinee may be contacted during the period as a licensed temporary visiting foreign amateur operator; and

(5) The starting and ending dates for the examinee's single, consecutive period as a licensed temporary visiting foreign amateur operator.

(e) Upon request, the coordinating VEC must periodically submit the information received from the administering VEs to the FCC.

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

RE: Amendment of the Amateur Radio Service Rules to Provide a Special Temporary Licensing Procedure for Visiting Foreign Amateur Operators.

I am concerned that the proposals contained in this *Notice* will disadvantage U.S. amateurs seeking to operate their amateur stations in countries that have not signed reciprocal operating agreements. What incentives will foreign governments have to enter reciprocal operating agree-

ments with the U.S. when their citizens are allowed to operate in this country without such agreements? Also, I am concerned that the proposal to allow foreign amateur operators the right to operate their amateur stations in the U.S. without reciprocal operating agreements is inconsistent with Sections 303(l)(3) and 310(c) of the Communications Act of 1934, as amended.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 31, 1992

CONSUMER ALERT:

ACCESSING LONG DISTANCE CARRIERS WHEN YOU TRAVEL

With the vacation season upon us, many consumers are now traveling throughout the country. The Commission would like to remind traveling consumers who wish to use a particular long distance carrier or Operator Service Provider (OSP) that they need to contact their carrier of choice for dialing instructions before leaving home. Consumers may use a variety of access codes to guarantee that they reach their preferred long distance carrier or OSP when using telephones available to the public from locations such as hotels, motels, hospitals, airports, gas stations and convenience stores.

Consumers may have difficulty reaching their carrier of choice from some locations because some telephones available to the public may not allow access to long distance companies or OSPs by dialing the five-digit (10XXX) access number assigned to those companies. When this occurs, consumers generally may access their preferred long distance company or OSP through the use of toll free "800" or local "950" access numbers. Federal law prohibits owners of public telephones from blocking access to the 800 and 950 access codes. The Commission has acted to ensure consumers' access to their preferred OSP by requiring most OSPs to establish an 800 or 950 access number for originating calls. The use of 800 or 950 access numbers will provide an access method for consumers where 10XXX access is temporarily unavailable.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Suspension of Licenses of

THOMAS M. HAYNIE
General Radiotelephone
Operator License PG-6-9934

and

Amateur Advanced Class Radio
Operator License

and

Revocation of License of

Thomas M. Haynie
Amateur Radio Station WB4PVK

ORDER TO SHOW CAUSE AND SUSPENSION ORDER

Adopted: July 27, 1992; Released: July 31, 1992

1. On September 24, 1990, Thomas M. Haynie, Virginia Beach, Virginia, was convicted by a federal District Court jury in Norfolk, Virginia, of one count of criminal felony violation of 18 U.S.C. §1367(a)[1] regarding the causing of intentional interference to the operation of a communications satellite and one count of criminal violation of 47 U.S.C. §301[2] regarding the unauthorized operation of a satellite uplink transmitter. On December 7, 1990, Haynie was sentenced to three years imprisonment, all of which was suspended; ordered to pay a $3,000 fine, $2,000 of which was suspended; and ordered to perform 50 hours of community service work each year for the next three years.

2. Haynie appealed, and on August 14, 1991, the U.S. Court of Appeals for the Fourth Circuit affirmed the District Court conviction. *See United States v. Haynie*, No. 91-5000 (Fourth Cir., August 14, 1991)(Unpublished). Haynie did not further appeal the Fourth Circuit decision, and it has now become final.

3. Haynie's conviction establishes, as *res judicata* in this proceeding, that he intentionally interfered with a satellite transmission in violation of Section 1367 of Title 18 of the U.S. Code and operated a satellite uplink transmitter without authorization in violation of Section 301 of Title 47 of the U.S. Code. In view of his conviction, it appears that Haynie lacks the requisite qualifications to possess a radio station license or to be a Commission licensed radio operator. The illegal activities demonstrate his unwillingness to comply with the Communications Act or the Commission's Rules and Regulations. The felony conviction is clearly relevant to evaluating the likelihood that he will comply with the Act and Commission Rules. *See Character Qualifications*, 5 FCC Rcd 3252 (1990).

4. Section 303(m)(1)(A) of the Act, 47 U.S.C. §303 (m)(1)(A), gives the Commission authority to suspend a radio operator's license for violating, causing, aiding or abetting the violation of any Act or treaty of the United States. Section 303 (m)(1)(E) of the Act, 47 U.S.C. §303 (m)(1)(E), gives the Commission the authority to suspend the operator license of any operator for willfully or maliciously interfering with any other radio communications or signal. Commission procedures regarding the suspension of radio operator licenses are set forth in Commission Rule Section 1.85, 47 C.F.R. §1.85.

5. Sections 312(a)(2) and (a)(4) of the Act, 47 C.F.R. §312(a)(2), (a)(4), give the Commission authority to revoke station licenses for matters coming to its attention which would warrant its refusal to grant a license and for willful or repeated violation of any provision of the Act.

6. Thomas M. Haynie IS THEREFORE ORDERED, under Sections 303(m)(2) of the Act, 47 U.S.C. §303(m)(2), and under Section 1.85 of the Commission's Rules, 47 C.F.R. §1.85, to show cause why his General Radiotelephone Operator License, PG-6-9934, and Amateur Advanced Class Radio Operator License should not be suspended. Haynie also IS ORDERED to show cause under Section 312 (c) of the Act, 47 U.S.C. §312 (c), and Section 1.91 of the Rules, 47 C.F.R. §1.91, why his Amateur radio station license, WB4PVK, should not be revoked.

7. Pursuant to the provisions of Section 303(m)(2) of the Act and Section 1.85 of the Rules, the licensee may request a hearing on the issues of suspension of his radio operator licenses no later than 15 days from the date of receipt of this ORDER. Pursuant to Section 312(c) of the Act and Section 1.91 of the Rules, the licensee may request a hearing on the station license revocation issue no later than 30 days after receipt of this notice. Because the Commission is merging these proceedings, the licensee will be given until 30 days from receipt of this ORDER in which to request a hearing on all issues involving his operator and station licenses. If a hearing is requested, a time, place and presiding Administrative Law Judge will be designated in a subsequent order. If Haynie does not request a hearing, the Commission will consider any written statement he wishes to submit and will determine, without a hearing, whether revocation is warranted.

8. Additionally, Haynie's captioned operator licenses are SUSPENDED under Section 303(m)(1)(A) of the Communications Act, 47 U.S.C.§303(m)(1)(A), for the remainder of the license terms, effective as indicated in this paragraph. If Haynie requests a hearing or submits a written statement concerning the suspensions, they will be held in abeyance until the matter is decided. If he does not request a hearing or submit a written statement, the suspensions will take effect 30 days after his receipt of this ORDER.

9. IT IS FURTHER ORDERED, that if Haynie requests a hearing, the proceeding will be decided based on the following issues:

(a) To determine whether, in light of the above mentioned conviction, Thomas M. Haynie is qualified to remain a Commission licensee.

(b) To determine whether the captioned radio station license should be revoked.

(c) To determine whether the operator license suspensions imposed by this ORDER should be affirmed.

10. If the licensee elects not to request a hearing, it is FURTHER ORDERED that he mail his Amateur Radio Operator's License, Amateur radio station license, General Radiotelephone Operator's License, and any pertinent verification card to Chief, Field Operations Bureau, Federal Communications Commission, 1919 M Street, Washington, D.C. 20554 (Attention File 1500G2).

11. Authority for this action is delegated to the Chief of the Field Operations Bureau under Sections 0.311 and 1.85 of the Rules, and to the Chief of the Private Bureau under Sections 0.331, and 1.85 of the Rules, 47 C.F.R. §§0.311, 0.331, and 1.85.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] Section 1367(a) provides that:

> Whoever, without the authority of the satellite operator, intentionally or maliciously interferes with the authorized operation of a communications or weather satellite or obstructs or hinders any satellite transmission shall be fined in accordance with this title or imprisoned not more than ten years or both.

[2] Section 301 of the Act states, in part, that:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act (footnotes omitted).

Before the
Federal Communications Commission
Washington, D.C. 20554

GC Docket No. 91-120

In the Matter of

Amendment of Sections 1.23
and 1.24 of the Commission's
Rules.

REPORT AND ORDER

Adopted: July 21, 1992; Released: August 6, 1992

By the Commission:

I. INTRODUCTION

1. On April 12, 1991, we adopted a *Notice of Proposed Rule Making* in the above-captioned proceeding.[1] The *Notice* proposed amendments to sections 1.23 and 1.24 of the Commission's rules governing the conduct of attorneys practicing before us. 47 C.F.R. §§ 1.23, 1.24. In response to the *Notice*, only the Federal Communications Bar Association (FCBA) filed comments.

2. The proposed amendments established procedures for temporarily suspending an attorney practicing before the Commission who is under an order of final suspension or disbarment issued by another court or agency. The temporary suspension would continue until our entry of an order taking final action in the FCC proceeding or a stay of the other forum's disciplinary order. Entry of an order of temporary suspension would be discretionary, not mandatory, but no opportunity for hearing would be afforded the subject attorney prior to the temporary suspension action. We also proposed to broaden the category of tribunals whose final orders of suspension or disbarment could render an attorney unfit to practice before the Commission, so as to include orders issued by federal and state agencies as well as courts.

II. DISCUSSION

3. In its Comments, the FCBA recognized that the proposed temporary suspension rule would safeguard the public from unethical practices and protect the integrity of the Commission's processes. The FCBA recommended that any order of temporary suspension should be limited to a 45 day period within which time the related disciplinary proceedings must be completed and our decision entered. We agree that disciplinary proceedings concerning a temporarily suspended attorney can have important practical and personal consequences and, therefore, we will endeavor to conduct and dispose of these proceedings expeditiously. Notably, however, the District of Columbia Bar Rules, upon which our rule is patterned, contains no provision requiring that a temporary suspension be lifted within a designated time period. Further, we intend to invoke temporary suspension only when it appears that an attorney's continued practice before us could imperil the integrity of our proceedings or pose a substantial risk to the public.[2] In view of these factors we shall not impose a strict time limitation upon temporary suspensions and the completion of our proceedings. We shall, however, make every effort to complete our proceedings within a 45 day period.

4. The *Notice* proposed the inclusion of a provision that an attorney, suspended, disbarred or otherwise restricted in the practice of law by virtue of a final order of any court, state or federal agency or other lawful tribunal could also be prohibited from practicing before the Commission. The FCBA opposes such a provision because, the FCBA contends, it would encompass the disciplinary actions of numerous and disparate federal and state agencies and courts that do not possess general disciplinary authority to disbar or suspend attorneys from practice at the state level. Rather, the FCBA urges that we should recognize for the purpose of possible disciplinary action only a final order by an authority authorized to regulate the practice of law generally within the borders of its territorial jurisdiction.

5. Upon further consideration, we agree with the reasoning of the FCBA and will narrow the category of tribunals whose disciplinary actions may prompt reciprocal action at the FCC. We are satisfied that any instances of professional misconduct that rise to a level of concern warranting disbarment at the Commission will likely come to our attention through the disciplinary action of a tribunal of general jurisdiction. We shall, therefore, amend section 1.23(a) of the rules to clarify that only an order by a tribunal vested with authority to regulate the practice of law within its territorial boundaries, i.e., any state, territory, or the District of Columbia, would cause us to consider initiating disciplinary proceedings against a practitioner before the Commission.[3]

6. Finally, the FCBA has asked that we amend our rules to include a provision to permit a practitioner, disbarred in one forum, but still permitted to practice in another, to continue his or her practice before the Commission upon a demonstration that the forum's disbarment procedures deprived the practitioner of due process or that the grounds for disbarment are irrelevant to the integrity of the attorney and the attorney's ability to render competent representation. In this connection, the FCBA also states that any disciplinary action arising from final orders of other jurisdictions should be limited to findings of professional misconduct and should not be imposed for nonsubstantive matters.

7. In response, we note that our proposed rules permit, but do not mandate, disbarment in the circumstances identified by the FCBA and contain no restriction on the scope of a respondent attorney's defenses in a disciplinary proceeding. The attorney involved may advance any relevant evidence that constitutes an affirmative defense or mitigating factor of which the Commission should be aware in the conduct of its disciplinary proceedings, including the factors identified by the FCBA. In all cases of attorney discipline, we shall, of course, make our decisions on a case-by-case basis.[4] In these circumstances, we believe it is unnecessary to codify expressly possible defenses as suggested by the FCBA.

III. CONCLUSION

8. In summary, we are adopting a rule to provide for the temporary suspension, at our discretion and without opportunity for hearing, of an attorney subject to a final order of suspension or disbarment by any tribunal of competent authority as specified herein. Our objective is to establish a procedure that will enable us to safeguard the public and the Commission's processes from the conduct of an attorney who has been found unfit to practice by another disciplinary tribunal. We shall not consider suspension or disbarment orders by all courts or federal or state agencies as grounds for disbarment at the Commission. We shall amend the rules to provide that only an order of a tribunal authorized to regulate the practice of law generally within its territorial boundaries would affect eligibility to practice or cause us to consider initiating disciplinary proceedings against a practitioner.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, That effective **September 21, 1992,** Part 1 of the Commission's rules, 47 C.F.R. Part 1, IS AMENDED as set forth in the Appendix. Authority for such action is found in sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

10. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

V. COMMISSION CONTACT

11. For further information regarding this proceeding, contact James B. Mullins in the General Counsel's Office at (202) 254-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority for Part 1 continues to read as follows:

AUTHORITY: Sections 4, 303, 48 Stat. 1066, 1082, as amended, 47 U.S.C. §§ 154, 303.

2. In Section 1.23, paragraph (a) is revised to read as follows:

Section 1.23 Persons who may be admitted to practice.

(a) Any person who is a member in good standing of the bar of the Supreme Court of the United States or of the highest court of any state, territory or the District of Columbia, and who is not under any final order of any authority having power to suspend or disbar an attorney in the practice of law within any state, territory or the District of Columbia that suspends, enjoins, restrains, disbars, or otherwise restricts him or her in the practice of law, may represent others before the Commission.

* * * * *

3. In Section 1.24, paragraph (b) is revised and paragraph (c) is added to read as follows:

Section 1.24 Censure, suspension, or disbarment of attorneys.

* * * * *

(b) Except as provided in paragraph (c) below, before any member of the bar of the Commission shall be censured, suspended, or disbarred, charges shall be preferred by the Commission against such practitioner, and he or she shall be afforded an opportunity to be heard thereon.

(c) Upon receipt of official notice from any authority having power to suspend or disbar an attorney in the practice of law within any state, territory, or the District of Columbia which demonstrates that an attorney practicing before the Commission is subject to an order of final suspension (not merely temporary suspension pending further action) or disbarment by such authority, the Commission may, without any preliminary hearing, enter an order temporarily suspending the attorney from practice before it pending final disposition of a disciplinary proceeding brought pursuant to subsection 1.24(a)(2), which shall afford such attorney an opportunity to be heard and directing the attorney to show cause within thirty days from the date of said order why identical discipline should not be imposed against such attorney by the Commission.

FOOTNOTES

[1] Amendment of Sections 1.23 and 1.24 of the Commission's Rules, GC Docket No. 91-120, Notice of Proposed Rule Making, 6 FCC Rcd 2203 (1991).

[2] We fully agree with the FCBA that the clients of a temporarily suspended attorney should not bear the adverse consequences of the attorney's misconduct. Thus, while we see no particular need to incorporate specific safeguards into our rules, we shall proceed, on a case-by-case basis, to assure that individual clients of a temporarily suspended attorney will have sufficient opportunity to obtain the services of substitute counsel.

[3] This modification to section 1.23(a) also serves to clarify that an otherwise qualified attorney would be eligible to practice before us as long as no tribunal or authority with general disciplinary authority had restrained that attorney from the practice of law.

[4] Within the confines of the term misconduct, for example, we do not consider the nonpayment of professional dues to be an offense upon which we would initiate separate disciplinary action.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-566

In the Matter of

Amendment of Section 73.202(b),	RM-7421
Table of Allotments,	RM-7656
FM Broadcast Stations.	RM-7657
(Decatur, Petal and Newton, Mississippi)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 16, 1992; Released: August 7, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6984 (1990), issued in response to a petition filed jointly by Thomas William Hickman III ("Hickman") and Newton Broadcasting Company, Inc. ("NBCI"). Hickman, licensee of Station WMFM(FM), Petal, Mississippi, requests the substitution of Channel 292C3 for Channel 292A at Petal, and modification of the license for Station WMFM(FM) accordingly. NBCI, licensee of Station WMYQ(FM), Newton, Mississippi, requests substitution of Channel 250A for Channel 292A at Newton and modification of its license for Station WMYQ(FM) to specify operation on Channel 250A. Hickman and NBCI filed comments. Hickman and NBCI and Vicki Y. Taylor ("Taylor") filed counterproposals.[2] Reply comments were filed by Hickman and NBCI and Taylor.

2. We have reviewed the pleadings before us and find that the public interest would be served by the substitution of Channel 292C3 for Channel 292A at Petal, Mississippi, since it will provide the community with a wide coverage area station.[3] Channel 292C3 can be allotted to Petal, Mississippi, in compliance with the Commission's spacing requirements at petitioner's specified site.[4] The allotment at Petal currently conflicts with the licensed site for Station WRZH(FM), Channel 292A, Picayune, Mississippi, and the licensed site of Station WGUD-FM, Channel 292A, Pascagoula, Mississippi. The authorization for each channel was modified in previous proceedings, and the substituted channels are fully spaced to Hickman's proposal.[5] Therefore, issuance of a license for Channel 292C3 at Petal may be withheld until Station WZRH(FM), Picayune, is licensed on Channel 291C2 and Station WGUD-FM, Pascagoula, is licensed on Channel 290C3. The allotment of Channel 292C3 at Petal also conflicts with an application filed by Hap-Hazard Broadcasting Company for Channel 291C3 at Chatom, Alabama (File No. 900314MM). Channel 292C3, Petal, does not conflict with the reference coordinates of the Chatom allotment, nor with the other two applicants for the Chatom allotment. In the event that Hap-Hazard Broadcasting Company is awarded the construction permit for the channel at Chatom, it will be permitted to amend its application to specify a non short-spaced site without loss of cut-off protection. Channel 250A can be allotted to Newton, Mississippi, in compliance with the Commission's spacing requirements at NBCI's present site.[6] The substitution of Channel 250A for 292A at Newton will enable Station WMYQ(FM) to increase its operation to 6kW and thus expand its coverage area. We shall modify the license for Station WMYQ(FM) at Newton, Mississippi, to specify operation on Channel 250A in accordance with the Commis-

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[1] The community of Decatur, Mississippi, has been added to the caption.

[2] The counterproposal filed jointly by Hickman and NBCI requested the substitution of Channel 292C2 for Channel 292A at Petal, Mississippi, and modification of the license for Station WMFM(FM) and substitution of Channel 250A for Channel 292A at Newton, Mississippi, and modification of the license for Station WMYQ(FM) (RM-7656). Taylor's counterproposal requested the allotment of Channel 250C3 to Decatur, Mississippi (RM-7657). Both counterproposals were placed on public notice March 6, 1991, Report No. 12047. Upon further analysis, we have determined that both counterproposals failed to include affidavits verifying that the statements contained in each were accurate to the best of the counterproponents' knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes* ("*Abuse of Process*"), 5 FCC Rcd 3910, n.41 (1990) (Therefore, we believe these rules should be strictly enforced in allocations proceedings). Counterproposals must be technically and procedurally correct at the time of their filing. *See Fort Bragg, California*, 6 FCC Rcd 5817 (1991) and *Report and Order, Broken Arrow and Bixby, Oklahoma and Coffeeville, Kansas*, 3 FCC Rcd 6507 (1988), *recon. denied* 4 FCC Rcd 6981 (1989). Therefore, we will dismiss the counterproposals filed by Hickman and NBCI and Taylor. Accordingly, comments filed in response to the counterproposals need not be considered.

[3] We recognize that Hickman and NBCI failed to comply with Section 1.52 of the Commission's Rules in filing the initial petition. However, the Commission placed all parties on notice, via the *Abuse of Process* item, that the verification requirements of Section 1.52 of the Rules would be strictly enforced in allotment proceedings. The effective date of that item was October 4, 1990. Therefore, because the petition filed by Hickman and NBCI was filed prior to the effective date of that proceeding, we shall accept the petition.

[4] The coordinates for Channel 292C3, Petal, are 31-32-00 and 89-10-44.

[5] The license for Station WGUD-FM, Pascagoula, was modified in MM Docket No. 86-55 to specify operation on Channel 290C3. *See* 4 FCC Rcd 7556 (1989). The license for Station WZRH(FM), Picayune, was modified in MM Docket No. 86-443 to specify operation on Channel 291C2. *See* 4 FCC Rcd 4519 (1989).

[6] The coordinates for Channel 250A at Newton are 32-19-46 and 89-10-08.

sion's Rules. We shall also modify the license for Station WMFM(FM), Petal, Mississippi, to specify operation on Channel 292C3 in lieu of Channel 292A in accordance with Section 1.420(g) of the Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 21, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Newton, Mississippi	250A
Petal, Mississippi	292C3

4. IT IS FURTHER ORDERED, That the Secretary of the Commission Shall Send By Certified Mail, Return Receipt Requested, a copy of this *Order* to the following applicant for Channel 291C3 at Chatom, Alabama:

Hap-Hazard Broadcasting Company
P.O. Box 1479
Cross City, Florida 32628

5. IT IS FURTHER ORDERED, That the Secretary of the Commission Shall Send By Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

WGUD Stereo, Inc.
P.O. Box 307
Pascagoula,
Mississippi 39568

Howes Broadcasting
Company, Inc.
P.O. Box 849
Picayune, Mississippi 39466

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WMFM(FM), Petal, Mississippi, IS MODIFIED to specify operation on Channel 292C3 in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the License of Station WMYQ(FM), Newton, Mississippi, IS MODIFIED, to specify operation on Channel 250A in lieu of Channel 292A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-6659 except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-6659, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

8. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the upgrade. As a result of this proceeding, Thomas William Hickman, III, licensee of Station WMFM(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

9. IT IS FURTHER ORDERED, That the counterproposal filed by Vicki Y. Taylor (RM-7657) IS DISMISSED.

10. IT IS FURTHER ORDERED, That the counterproposal filed by Thomas William Hickman III and Newton Broadcasting Company, Inc. (RM-7656) IS DISMISSED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-220

In the Matter of

Amendment of Section 73.202(b),	RM-7746
Table of Allotments,	RM-7842
FM Broadcast Stations.	
(Bishop and Benavides, Texas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 15, 1992; Released: August 7, 1992

By the Chief, Allocations Branch:

1. At the request of Cismek Corporation ("petitioner"), licensee of Station KFLZ-FM, Channel 296A, Bishop, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4517 (1991), proposing the substitution of Channel 299C3 for Channel 296A at Bishop, and the modification of Station KFLZ-FM's license to specify operation on the higher powered channel. Petitioner filed supporting comments reaffirming its intention to apply for Channel 299C3 if allotted to Bishop. Benavides Broadcasting Associates ("BBA") filed a counterproposal.[2] Petitioner and BBA filed reply comments.

2. In its counterproposal, BBA requests the allotment of Channel 299C2 to Benavides, Texas, as that community's first local aural transmission service. In support of its request, BBA states that Benavides is a significant community with a population of 1,978, and deserving of its own station. In addition, BBA notes its proposed allotment would provide a new reception service to nearly all of Duval County, which has a 1980 U.S. Census population of more than 12,000.

3. In response, petitioner states that BBA's counterproposal is defective and should be dismissed. Petitioner asserts that BBA's counterproposal did not comply with the requirements of Section 1.52 of the Commission's Rules regarding subscription and verification since it did not include of an address.[3] Nevertheless, petitioner suggests the allotment of Channel 295C2 to Benavides as an alternate channel. Petitioner states its alternative proposal would allow the Bishop upgrade while providing the community of Benavides with a Class C2 channel. BAA, in its reply comments, argues that pursuant to the Commission's allotment priorities, a first local service is preferred over the provision of an expanded service for an existing station, citing *Kingstree and McClellanville, South Carolina*, 3 FCC Rcd 1637, (1982). Therefore, BBA urges the allotment of Channel 299C2 to Benavides and states it will file an application for Channel 299C2, if allotted.

4. After reviewing the proposals before us, we believe the public interest would be served by the provision of a first local service at Benavides as well as the expansion of service by Station KFLZ-FM to Bishop. We find petitioner's proposal to allot Channel 295C2 to Benavides is unacceptable since the channel is short-spaced to a number of FM allotments.[4] Since neither the proponents nor the Commission's staff has been able to identify an alternate channel for allotment to either community, we must comparatively consider these proposals. Under the Commission's FM allotment priorities, a first local FM service is generally preferred over a proposal to upgrade an existing facility.[5] If the proponent for a channel upgrade is in conflict with a proposal for a new allotment, the upgrade proponent may demonstrate that its proposal should be preferred by providing a showing of need for the proposed increase in existing service. This could take the form of a comparison indicating which new areas are to be covered and the extent to which these areas are currently unserved or underserved. In the absence of such a showing of need for the proposed increase in service, a conflicting new allotment would be favored since it represents a new service.[6] Petitioner has not made such a showing. Therefore, we find that the provision of a new first service at Benavides must be preferred over a proposal to upgrade existing service at Bishop.

5. In consideration of the above, we believe the public interest would be served by the allotment of Channel 299C2 to Benavides, Texas, since it would provide the community with its first aural transmission service. Channel 299C2 can be allotted to Benavides in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.7 kilometers (4.1 miles) west to accommodate BBA's desired site.[7] Since Benavides is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government has been obtained for this allotment. Because the proposed transmitter site for Channel 299C2 is located within 80 kilometers of the Federal Communications Commission's monitoring station at Kingsville, Texas, all applicants should refer to the provisions of Section

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[1] The community of Benavides, Texas, has been added to the caption.

[2] Public Notice of the counterproposal was given on October 28, 1991, Report No. 1866.

[3] The Public Notice announcing BBA's counterproposal included the address of the counterproponent. Therefore, the failure of BBA to include an address resulted in no prejudice to any party.

[4] Our engineering analysis of petitioner's proposal indicates using coordinates specified in BBA's petition (27-35-18 and 98-28-31), Channel 295C2 is short-spaced to Station KPSO-FM, Channel 292A, Falfurrias, Texas, Station KKYX-FM, Channel 294C, Terrell, Texas, vacant Channel 295A, Anahuac, Nuevo Leon, Mexico, vacant Channel 296A, Nuevo Laredo, Tamaulipas, Mexico, and to a counterproposal filed in MM Docket No. 91-79, 6 FCC Rcd 1847 (1991), to allot Channel 295A at San Pedro, Texas.

[5] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982); *see also Benton Arkansas, et al;* 3 FCC Rcd 4840 (1988), *recon. denied*, 7 FCC Rcd 2555 (1992).

[6] *See Benton, Arkansas, supra.*

[7] The coordinates for Channel 299C2 at Benavides are North Latitude 27-35-18 and West Longitude 98-28-31.

73.1030(c)(1)-(5) of the Rules governing protection of Federal Communications Monitoring Station when filing their applications.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 21, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Benavides, Texas	299C2

7. The window period for filing applications will open on **September 22, 1992,** and close on **October 22, 1992.**

8. IT IS FURTHER ORDERED, That the petition for Rule Making filed by Cismek Corporation (RM-7746) requesting the substitution of Channel 299C3 for Channel 296A at Bishop, Texas, IS DENIED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-162

In the Matter of

Amendment of Section 73.202(b), RM-8032
Table of Allotments,
FM Broadcast Stations.
(Norwood, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 17, 1992; Released: August 7, 1992

Comment Date: September 28, 1992
Reply Comment Date: October 13, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Renard Communications Corp. ("petitioner") requesting the allotment of Channel 241A to Norwood, New York, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 241A to Norwood since it could provide the community with its first local FM service. Channel 241A can be allotted to Norwood in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.4 kilometers (3.3 miles) north to avoid a short-spacing to Station WVNC, Channel 244A, Canton, New York.[1] While the allotment would be short-spaced to Station CBOC-FM, Channel 238A, Cornwall, Ontario, Station CJFM-FM, Channel 240C1, Montreal, Quebec, and Station CFMK-FM, Channel 242B, Kingston, Ontario, Canada, we believe that the use of Channel 241A at Norwood will not result in any prohibited interference. Therefore, since Norwood is located within 320 kilometers (200 miles) of the U.S.-Canadian border, we will request concurrence by the Canadian government in the allotment of Channel 241A as a specially negotiated allotment.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Norwood, New York	--	241A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 28, 1992,** and reply comments on or before **October 13, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Craig L. Fox, President
Renard Communications Corp.
4853 Manor Hill Drive
Syracuse, New York 13215-1336
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 241A at Norwood are North Latitude 44-47-51 and West Longitude 74-58-12.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-161

In the Matter of

Amendment of Section 73.202(b), RM-8011
Table of Allotments,
FM Broadcast Stations.
(Glencoe and Le Sueur,
Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 20, 1992; Released: August 7, 1992

Comment Date: September 28, 1992
Reply Comment Date: October 13, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the petition for rule making filed by Waite Park Broadcasting Company ("petitioner"), permittee of Station KQXA, Channel 241A, Le Sueur, Minnesota, requesting the substitution of Channel 241C3 for Channel 241A and reallotment of the channel from Le Sueur, Minnesota, to Glencoe, Minnesota, as that community's first local service. Petitioner also requests modification of its construction permit for Station KQXA, Le Sueur, to specify Glencoe, Minnesota, as its community of license. Petitioner states that it will apply for Channel 241C3 at Glencoe, if allotted.

2. Petitioner seeks to invoke the provisions of Station 1.420(i) of the Commission's Rules, which permit the modifiation of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), *recon. granted in part ("Change of Community MO&O")*, 5 FCC Rcd 7094 (1990). Petitioner recognizes that the Commission prohibits the removal of a community's sole local transmission service, except "in rare circumstances where removal of a local service might serve the public interest." 5 FCC Rcd at 7096. Petitioner claims that removal of Le Sueur's sole local transmission service is warranted in this case.

3. Petitioner states that the reallotment and upgrading of Channel 241A would provide Glencoe, a community of 4,648 persons,[1] with its first local transmission service, whereas it is currently impossible to provide any servce at Le Sueur, a community of 3,763. Petitioner notes that it has been attempting to construct and operate Station KQXA at Le Sueur since April 14, 1991. However, petitioner states that the only transmitter location at Le Sueur which meets the Commission's spacing rules is a small portion of eastern Sibley County, Minnesota. According to petitioner, it applied to the Sibley County Planning Commission on January 8, 1992, for a conditional use permit to construct a transmitting tower for Station KQXA. The Planning Commission denied its request which was then referred to the Sibley County Broard of Commissioners for review. On Feburary 25, 1992, the request was again denied. Petitioner further states that there are no existing towers available to it which are fully spaced and would provide the required city grade signal over Le Sueur. As a consequence, petitioner has never operated Station KQXA at Le Sueur. Petitioner claims that a site is available at Glencoe that fully meets the Commission's channel spacing rules. According to petitioner, deleting the allotment at Le Sueur will not deprive the community of broadcast service as four FM stations serve Le Sueur with a 60 dBu coverage contour. Station KRBI(AM), St. Peter, Minnesota, encompasses Le Sueur with its 2 mV/m signal contour. Petitioner claims that Station KRBI(AM) has provided significant programming directed towards the needs of the residents of Le Sueur since 1957, and since 1959 has maintained a full time studio and office in Le Sueur. Petitioner believes that reallotment of the channel from Le Sueur to Glencoe will create a more equitable distribution of broadcast service and a more efficient use of the broadcast specturm.

4. Petitioner states that Glencoe (population 4,648 persons) is an incorporated city, located in the south central portion of the state. Petitioner further states that Glencoe is the county seat of McLeod County, has its own zip code and is a self-governing community. According to information published by the Glencoe Chamber of Commerce, the community has seven churches, two elementary schools, one intermediate and one high school and several parochial schools. Glencoe has its own fire department, police and sheriff's department, hospital and medical clinic and a newspaper. Glencoe also has a Jaycees, Lion's club, VFW Post and Auxiliary, an American Legion and the usual complement of businesses generally found in communities of this size. Petitioner contends that all the indicia support a conclusion that Glencoe is a community for allotment purposes.

5. An engineering analysis has determined that Channel 241C3 can be allotted to Glencoe in compliance with the Commission's minimum distance separation requirements at petitioner's specified site.[2]

6. We do not generally believe that the public interest is served by removing a community's sole local service merely to provide a first local transmission service to another community. While the removal of Channel 241A from Le Sueur will remove that community's only potential local service, and provide a first local transmission service to Glencoe, we tentatively conclude that petitioner has shown that it is unable to operate the station at Le Sueur despite diligent efforts. Since Station KQXA has never been on the air, a change in community will not cause any disruption to existing service. Therefore, we believe the public interest would be served by seeking

[1] Population figures are taken from the 1990 census.
[2] The coordinates for Channel 241C3 at Glencoe are 44-46-09 and 94-09-05.

comments on this proposal. We request comments on our tenative conclusion that a waiver of our restriction on removal of sole existing local transmission service is warranted in this instance.

7. As requested, we shall propose to modify the construction permit for Channel 241A, Le Sueur, to specify operation on Channel 241C3 at Glencoe in accordance with Sections 1.420(g) and (i) of the Commission's Rules. We shall not accept competing expressions of interest in the use of Channel 241C3 at Glencoe or require the petitioner to demonstrate the avaibility of an additional equivalent class channel at Glencoe.

8. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Glencoe, Minnesota	--	241C3
Le Sueur, Minnesota	241A	--

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **September 28, 1992,** and reply comments on or before **October 13, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitione's counsel, as follows:

John S. Neely
Miller & Miller, P.C.
P.O. Box 33003
Washington, D.C. 20033

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-178

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Bayou Vista, Louisiana)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 15, 1992; Released: August 7, 1992

By the Chief, Policy and Rules Division:

1. Before the Commission is a petition for reconsideration of the *Report and Order* in this proceeding, 5 FCC Rcd 2152 (1990), filed by C. R. Crisler ("Crisler").[1] The *Report and Order* granted co-channel Class C3 upgrades to 85 communities throughout the United States, on the Commission's own motion. Teche Broadcasting Corp. ("Teche"), licensee of Station KQKI-FM, Channel 237A, Bayou Vista, Louisiana, which received a Class C3 upgrade, filed an opposition to Crisler's petition for reconsideration.[2]

2. *Background.* This proceeding originated with a *Notice of Proposed Rule Making*, 4 FCC Rcd 5357 (1989), proposing to upgrade 149 Class A stations to Class C3 facilities. The *Notice* stated that any listed licensee or permittee must file a statement of interest in the upgrade prior to the end of the comment period. Ultimately, the *Report and Order* substituted Class C3 stations in 85 of the listed communities, including Station KQKI-FM, Channel 237A, Bayou Vista, Louisiana. The *Report and Order* indicated that no party had filed specific objections to the adopted proposals.

3. Crisler asserts in his petition for reconsideration that he had no prior notice of the proposed substitution of Channel 237C3 for Channel 237A at Bayou Vista and that such substitution would be short spaced to his earlier filed proposal to substitute Channel 238C2 for Channel 238A at Lafayette, Louisiana. Crisler claims that such substitution adversely impacts two pending court cases before the United States Court of Appeals for the District of Columbia Circuit. *C. R. Crisler v. FCC*, Civil Cases 89-1459 and 90-1054. Civil Case 89-1459 was an appeal of the Commission's *Memorandum Opinion and Order*, 3 FCC Rcd 4614 (1988), which denied Crisler's petition to substitute Channel 238C2 for Channel 238A at Lafayette. Civil Case 90-1054 was an appeal of the Commission's grant of a construction permit to Lafayette FM Joint Venture to build a station on Channel 238A at Lafayette, Louisiana.[3] Crisler argues that until the court disposes of these pending appeals, the Commission must not act on the proposed substitution at Bayou Vista.

4. *Discussion.* We will dismiss Crisler's petition for reconsideration. Civil Case No. 89-1459 was acted on by the United States Court of Appeals for the District of Columbia Circuit on December 5, 1990. The court affirmed the Commission's decision. Civil Case No. 90-1054 was dismissed as premature by motion of the Commission by an order dated July 25, 1990. Given that the petition for reconsideration is premised on the possibility that the Bayou Vista upgrade could adversely impact Crisler's pending court cases, the adjudication of those cases eliminates the need for us to consider this petition.[4] Crisler's lack of knowledge with respect to the proposed substitution also fails because the Commission gave appropriate public notice of its intended action at Bayou Vista through the issuance of a *Notice of Proposed Rule Making*.[5]

5. THEREFORE, IT IS ORDERED, That the Petition for Reconsideration filed by C.R. Crisler IS DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] Public notice of the filing of Crisler's petition was given on June 26, 1990, Report No. 1818.

[2] We need not consider Teche's opposition, given our resolution of the proceeding herein.

[3] *See Hearing Designation Order*, 2 FCC Rcd 6525 (1987).

[4] In any event, the Bayou Vista proceeding could not have prejudiced the outcome of these cases. Although Crisler feared that the allotment of Channel 237C3 to Bayou Vista could preclude the substitution of Channel 238C2 for Channel 238A at Lafayette, the Commission has proposed such a substitution. *See Notice of Proposed Rule Making*, (Lafayette, Louisiana), 5 FCC Rcd 6954 (1990). In addition, the Bayou Vista substitution would not affect the grant of the permit for Channel 238A at Lafayette.

[5] *See* Section 1.429(b) of the Commission's Rules. Crisler has not presented any evidence that warrants reconsideration of our earlier decision.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-88

In the Matter of

Amendment of Section 73.202(b), RM-6981
Table of Allotments,
FM Broadcast Stations.
(West Monroe, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 17, 1992; Released: August 7, 1992

By the Chief, Allocations Branch:

1. At the request of Phoenix Broadcasting Company ("petitioner"), former licensee of Station KYEA-FM, the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 1270 (1990), proposing the substitution of Channel 252C1 for Channel 252C2 at West Monroe, and modification of Station KYEA-FM's license to specify the higher powered channel. Joint comments were filed by petitioner and Broad Based Communications, Inc. ("Broad Based") successor-in-interest to the petitioner, stating their intention to apply for Channel 252C1 if allotted.[1] No other comments were received.

2. We believe the public interest will be served by substituting Channel 252C1 for Channel 252C2 at West Monroe, since it would provide the community with an expanded coverage area FM service. Channel 252C1 can be allotted to West Monroe in compliance with the Commission's minimum distance separation requirements with a site restriction of 46.5 kilometers (28.9 miles) southeast in order to avoid a short-spacing to Station KPCH-FM, Channel 251C, Dubach, Louisiana.[2] We recognize that the allotment of Channel 252C1 to West Monroe conflicts with the presently licensed operation of Station KLAA-FM, Channel 252A, Tioga, Louisiana. However, on July 2, 1992, Station KLAA-FM's application for license to cover its construction permit (BPH-890303IB) on Channel 278C2 was granted, thereby eliminating any conflict with this proceeding. As requested, we will also modify Station KYEA-FM's license to specify operation on Channel 252C1 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 21, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
West Monroe, Louisiana	252C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Broad Based Communications, Inc., for Station KYEA-FM, West Monroe, Louisiana, IS MODIFIED to specify operation on Channel 252C1, in lieu of Channel 252C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Broad Based is now the licensee of Station KYEA-FM, pursuant to the Commission's grant of the assignment of petitioner's license on April 20, 1990.

[2] The coordinates for Channel 252C1 at West Monroe are North Latitude 32-11-49 and West Longitude 91-49-58. Since the West Monroe substitution is made as a result of a petition for rule making filed prior to October 2, 1989, Broad Based Communications, Inc., may avail itself of the provisions of Section 73.213 (c)(1) with respect to Station WJDR-FM, Channel 252A, Prentiss, Mississippi.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI INTERNATIONAL INC. File No. I-T-C-92-172

Application for authorization under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the PTAT-1 Cable System for the provision of authorized common carrier service between the United States, on the one hand, and Dominica and St. Kitts and Nevis on the other hand.

ORDER AND AUTHORIZATION

Adopted: July 22, 1992; Released: August 7, 1992

By the Chief, International Facilities Division:

1. The above-captioned application, filed on May 21, 1992 and supplemented by letter of July 13, 1992 by MCI International, Inc. (MCII), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S., on the one hand, and Dominica and St. Kitts and Nevis, on the other hand, and beyond. The application was placed on public notice on May 27, 1992. No comments were received.

2. MCII is a non-dominant international carrier currently providing international services to the points reached via the PTAT-1 cable system. MCII has been authorized to acquire and operate capacities in the PTAT-1 cable system for service between the U.S. and the United Kingdom, the Republic of Ireland, Bermuda and Antigua.[1] It now proposes to acquire and operate an additional one-half interest in 33 voice-grade circuits in PTAT-1. MCII states that it will be using the capacity in PTAT-1 to supplement existing facilities and not to divert any portion of its traffic from other existing common carrier facilities.

3. The Commission stated in its *Private Submarine Cable Decision*[2] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[3] In this context, we find that MCII's application contains all of the information necessary under Section 63.01 of the Commission's Rules.[4] Furthermore, we find that MCII's application does not raise any economic impact issues.[5]

4. Upon consideration of the application, we find that authorization of the facilities requested would serve the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-92-172 IS GRANTED and MCII is authorized to:

a. acquire, on an Indefeasible Right of User (IRU) basis, a one half interest in and operate 33 voice-grade circuits in the PTAT-1 cable between the cablehead at Manasquan, New Jersey and the cablehead at Devonshire, Bermuda;

b. lease and operate 33 voice-grade circuits between the cablehead at Manasquan, New Jersey and MCII's West Orange, New Jersey operating center;

c. acquire, on an IRU basis, a one-half interest in and operate 33 voice-grade circuits in the Caribbean Atlantic Cable System (CARAC) between Devonshire, Bermuda and Chawell, Tortola;

d. lease a one-half interest in and operate 33 voice-grade connecting circuits between the CARAC cablehead at Chawell, Tortola and the Digital Eastern Caribbean Microwave System (DECMS);

e. lease a one-half interest in and operate 17 voice-grade circuits in the DECMS between Tortola and Dominica;

f. lease a one-half interest in and operate 16 voice-grade circuits in the DECMS between Tortola and St. Kitts and Nevis; and

g. use said facilities to provide MCII's regularly authorized services between the U.S. and Dominica (17 circuits) and St. Kitts and Nevis (16 voice-grade circuits).

6. IT IS FURTHER ORDERED that this authorization is subject to the terms and conditions of any license issued to PSI herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§ 34-39).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of this Order's public notice date (See Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* CICI, Inc. *et al*, 4 FCC Rcd 6622 (1989) and MCI International, Inc., 4 FCC Rcd 8446 (1989), 5 FCC Rcd 453 (1990), 5 FCC Rcd 1929 (1990) and 5 FCC Rcd 7710 (1990).

[2] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[3] This requirement was restated in the *International* decision in which the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. International Competitive Car-

rier Policies, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[4] The Commission places no special burdens on any carrier filing an application to use private cable capacity. *See* Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989)(Pacific Telecom decision).

[5] In its Pacific Telecom decision, the Commission stated that it has authority under its public interest mandate under Section 214 to consider sua sponte and economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICRONET, INC.

Application for authority to establish channels of communication between the U.S. and INTELSAT Atlantic Ocean satellites for the provision of International Television Service.	File No. I-T-C-92-170
Application for authority to establish channels of communication between the U.S. and INTELSAT Pacific Ocean satellites for the provision of International Television Services.	File No. I-T-C-92-171

ORDER AND AUTHORIZATION

Adopted: July 22, 1992; Released: August 7, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the provision of International Television Service by Micronet, Inc.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-170 and I-T-C-92-171 ARE GRANTED, and Micronet is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites for the provision of International Television Service between the U.S. and countries listed in Comsat's Tariff F.C.C. No. 103 for the space segment of International Television Service.

3. IT IS FURTHER ORDERED that the authority granted herein for Micronet to establish channels of communication between the earth stations in the U.S. and the INTELSAT satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

4. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

5. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Micronet and its correspondents, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of this Order's public notice date (See Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

L.D.C. CONSULTANTS — File No. I-T-C-92-155

Application for authority to operate as an international resale carrier.

OCOM CORP. D/B/A CELLULAR LONG DISTANCE CO. — File No. I-T-C-92-159

Application for authority to operate as an international resale carrier.

LIGHTCOM INTERNATIONAL, INC. — File No. I-T-C-92-161

Application for authority to operate as an international resale carrier.

CCT, INC. — File No. I-T-C-92-168

Application for authority to operate as an international resale carrier.

CAPITAL TELECOMMUNICATIONS, INC. — File No. I-T-C-92-169

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 22, 1992; Released: August 7, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by L.D.C. Consultants (LDC), OCOM Corp. d/b/a Cellular Long Distance Co., Lightcom International, Inc. (Lightcom), CCT, Inc. and Capital Telecommunications, Inc. (Capital).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-155, I-T-C-92-159, I-T-C-92-161, I-T-C-92-168 and I-T-C-92-169 ARE GRANTED, and

a. LDC is authorized to provide international switched voice service by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs;

b. OCOM is authorized to provide international switched service by the resale of the international switched voice service set forth in Litel's Tariff F.C.C. No. 1 between the U.S. and the points listed in that tariff;

c. Lightcom is authorized to provide international switched voice service by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2, ATC's Tariff F.C.C. No. 2, Cable & Wireless' Tariff F.C.C. No. 3, TRT/FTC's Tariff F.C.C. No. 15 and Worldcom's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs;

d. CCT is authorized to provide international switched service by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US sprint's Tariffs F.C.C. No. 1 and 2 ATC's Tariff F.C.C. No. 2, Cable & Wireless' Tariff F.C.C. No. 3, TRT/FTC's Tariff F.C.C. No. 15, Litel's Tariff F.C.C. No. 1 and Worldcom's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs; and

e. Capital is authorized to provide international switched service by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2, TRT/FTC's Tariff F.C.C. No. 15, Cable & Wireless' Tariff F.C.C. No. 3 and Litel's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of

Provision of Access
for 800 Service

ORDER

Adopted: July 28, 1992; Released: July 28, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 2, 1992, the NYNEX Telephone Companies (NYNEX) filed a petition for waiver of the access time standards for 800 data base access, established in the Memorandum Opinion and Order on Reconsideration in this docket.[1] We now grant NYNEX's requested waiver of the March 1993 access time standard, but deny, without prejudice, its requested waiver of the March 1995 standard.

II. BACKGROUND

2. The Reconsideration Order established revised access time standards for the implementation of the 800 data base system. Under the revised standards, each LEC may replace the current NXX access system with mandatory data base access when that LEC can reduce access times for 97% of its originating 800 data base access traffic to five seconds or less, provided that, within two years thereafter, (a) none of its data base 800 traffic experiences an access time of greater than five seconds, and (b) the mean access time for all of its 800 data base traffic is 2.5 seconds or less. The Commission required the Bell Operating Companies (BOCs) and GTE to meet the first tier requirement (the 5-second/97% standard) by March 1993.

3. The revised standards reflected a careful balancing of the benefits of the data base system, most notably, 800 number portability, with the costs of increased access delays. They were also the product of undisputed industry data about access times under both the current NXX system and the data base system. In particular, the Commission relied on an industry consensus at the time that: (1) access times under NXX access are 1.9 seconds, if the IXC interconnects at the end office, and 3.5 seconds, if the IXC interconnects at a tandem; (2) about 2/3 of current NXX traffic is delivered directly from the end office (so that the mean access time today is about 2.5 seconds); and (3) access times under a data base system would be 0.8 seconds, 1.0 seconds, 4.1 seconds, 4.8 seconds, or 8.1 seconds, depending upon the configuration of the originating LEC's network and the level of SS7 deployment in that network.[2]

III. NYNEX'S WAIVER PETITION

4. NYNEX states that following the release of the Reconsideration Order, as it and other BOCs began implementing their data base system, they began testing access times using different end office and access tandem switch types. It claims that these tests revealed that, both for NXX access and data base access, access times vary by switch type and that newer digital switches result in longer access times than older switches, which had been used for earlier access time testing.[3] For NXX access, the tests showed that access times range from 1.5 to 3.1 seconds for end office connections and 3.3 to 5.8 seconds for access tandem connections.[4] For data base access, the tests showed that for certain switches, access times would exceed five seconds, even with SS7 interconnection at the access tandem. In light of these test results, NYNEX asks for a waiver of the 1993 and 1995 access time standards. The following chart sets forth the access times NYNEX proposes:[5]

	Percentage of Traffic Less Than:			
Date	**5 Seconds**	**5.5 Seconds**	**6 Seconds**	**6.5 Seconds**
3/93	92	97		100
3/95	98			100

5. NYNEX states that because NXX access times are in many cases longer than had been previously represented, its waivers would not result in access time increases in excess of the 3.1 second maximum contemplated by the

[1] *See* Provision of Access for 800 Service, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991) (*Reconsideration Order*). As defined in the Reconsideration Order, "access time" is the time that begins when the caller completes dialing an 800 call and ends when the call is delivered by the originating local exchange carrier (LEC) to an interexchange carrier (IXC). Callers experience additional delay as the IXC then completes the call through its network and the terminating LEC's network to the 800 subscriber. *Id.* at note 4.

[2] *Id.* at 5422-23, 5425.

[3] NYNEX Petition at 3-4; Attachment C.

[4] *See* NYNEX Petition at 9-14; Bellcore 800 Database Access Time Study, Special Report SR-NWT-002251, Issue 1, February 1992 at 21. The Bellcore Access Time Study was attached as an appendix to the BOC/GTE 800 Data Base Implementation Plan, filed March 2, 1992.

[5] These access time projections represent NYNEX's capabilities -- not the actual access times that will occur. In other words, these data assume that IXCs use SS7 interconnection wherever NYNEX makes it available. If some IXCs do not elect to use SS7 interconnection, those IXCs' access times will be longer. These projections also assume, of course, that the 800 data base implementation process proceeds as planned, and in particular, that LEC/IXC SS7 interconnection testing and trunk conversions scheduled over the next six to eight months occur on schedule. Finally, these projections assume the installation of a software patch in certain Northern Telecom and AT&T switches that will reduce access times for those switches by as much as one second or more. The Northern Telecom patch is currently available, while the AT&T patch is scheduled for availability in November or December 1992.

Commission when it adopted a 5-second access time standard. It states that if IXCs take SS7 interconnection where available, less than. 5% of NYNEX-originated traffic will experience an increase in access time of more than three seconds.[6]

6. NYNEX claims that while it cannot meet the 5 second/97% standard in March 1993, it has substantially accelerated its network deployment plans and will, in fact, exceed FCC access time standards in various respects. It states that it is already operating under extremely tight deadlines and that there is not enough time between now and March 1993 to make the network changes necessary to meet the 1993 access time standard.

7. NYNEX also asks us to waive the March 1995 requirement that all access times be 5 seconds or less. Specifically, it asks that it be permitted to offer access times of between 5 and 6.5 seconds for two percent of its traffic after March 1995. It claims that in order to reduce all access times to five seconds, it would have to replace twenty 2B ESS switches, at a total cost of approximately $73 million. These switches, it claims, are currently scheduled for replacement between 1995 and 1998. In addition, it states it would be required to accelerate scheduled upgrades to a small number of DMS-10 switches. It claims that its switch replacement program is already extremely ambitious and that adding further switch replacments of this magnitude before 1995 could jeopardize other significant switch replacements that are currently scheduled.[7]

IV. POSITIONS OF OTHER PARTIES

8. Commenting parties address NYNEX's waiver request in conjunction with similar waiver requests filed by other LECs. AT&T, CompTel, NDC, and ARINC generally oppose the LEC waivers. VISA also opposes the waivers, pending more detailed information on their impact on users. USTA, Centel, MCI, and Sprint support them, although MCI supports a waiver only of the 1993 access time standards, while opposing any waiver of the 1995 standards at this time.[8] Other parties, such as Ad Hoc, ICA, and Cable & Wireless neither support nor oppose the waivers in their comments, pending further information.[9]

9. Parties opposing the waivers claim that the LECs do not adequately support their claims that waivers are necessary and warranted. For example, AT&T argues that LEC claims as to the cost of complying with the access time standards are not substantiated.[10] Similarly, CompTel and ARINC assert that LECs have not demonstrated that acceleration of their SS7 deployment plans would jeopardize network reliability.[11] They argue that waivers should not be granted unless LECs provide more detailed substantiation of LEC network reliability concerns, including quantification of the risks of outages or increased blockage. AT&T and ARINC claim, further, that the waivers would upset the careful balancing of interests incorporated into the access time standard and would degrade the quality of 800 access service.[12] In addition, several parties state that LECs did not provide sufficient information about the parameters of the tests underlying the new access time estimates. They argue that without this information, they cannot assess the accuracy or completeness of the revised data or its impact on IXCs or end users.[13] Finally, NDC argues that the waivers are really untimely petitions for reconsideration of the access time standard insofar as they assume the invalidity of that standard.[14]

10. Parties supporting the waivers claim that the small increase in access times that the waivers would permit is acceptable, at least for March 1993.[15] MCI urges that the Commission grant a blanket waiver that would permit LECs to implement mandatory data base access when 95% of its traffic experiences an access time of 6 seconds or less.[16] MCI opposes LEC requests for a waiver of the 1995 access time standards, claiming that it is premature to address these requests at this time, particularly since technological developments and changed network deployment plans may render these waivers unnecessary.[17]

11. Parties that neither support nor oppose the waivers express more concern about the reliability and firmness of the access time data set forth in the LEC waivers than with the revised access time standards proposed in the waiver petitions.[18] Most of these parties echo other parties' concern that insufficient information was provided about how the access time tests were conducted, information that they claim is essential to an assessment of the reliability of these tests.[19] In addition, Ad Hoc notes that some LECs did not specifically commit to achieving the access times set forth in their waiver petitions, and it asks for such commitments.[20] Several parties also ask for various additional information about the extent to which nonconforming access times would exceed five seconds and the geographic distribution of traffic with higher access times.[21]

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[6] Letter from Susanne Guyer, Director, Federal Regulatory Matters, NYNEX, to Donna R. Searcy, Secretary, FCC, April 13, 1992.

[7] NYNEX Petition at note 28.

[8] Sprint initially opposed US West's waiver request but withdrew its opposition in light of the representations made in US West's Reply Comments. *See* letter from Norina Moy, Manager, Federal Regulatory Affairs, US Sprint, to Donna Searcy, Secretary, FCC, May 22, 1992.

[9] ICA asks us to establish a second pleading cycle on the waiver petitions following receipt of the BOC/GTE Reply to comments on the BOC/GTE 800 Data Base Implementation Plan. ICA Comments at 7.

[10] AT&T Comments at 4.

[11] CompTel Comments at note 7; ARINC Comments at 9.

[12] AT&T Comments at 3-5; ARINC Comments at 1-5.

[13] *See, e.g.*, AT&T Comments at 5-6; CompTel Comments at 4-5; Allnet Comments at 1-2; ICA Comments at 5-6; NDC Reply at 3.

[14] NDC Reply at 6-7.

[15] *See* USTA Comments at 2-3; MCI Comments at 6; Sprint Comments at 13. *Cf.* Ad Hoc Comments at 6 ("A *slight* slippage of access time standards is not itself a terribly adverse matter.")

[16] MCI Comments at 6.

[17] In reply to MCI's Comments, some LECs, including NYNEX, indicate that they do not oppose a deferral of the 1995 waivers at this time. *See* NYNEX Reply at note 9; US West Reply at 16-17.

[18] *See, e.g.* Ad Hoc Comments at 7-11.

[19] *See, e.g.*, Cable & Wireless Comments at Appendix 1, Ad Hoc Comments at 10-11.

[20] Ad Hoc Comments at 9.

[21] *See e.g.*, ICA Comments at 7-11. *See also* NDC Comments at 9-12; VISA Comments at 3-7. ICA states that each LEC should be required to make available "exception lists" showing each end office where access delays in excess of 5.5 seconds may

V. DISCUSSION

12. We now grant NYNEX's requested waiver of the 1993 access time standards but deny, without prejudice, its request for a waiver of the 1995 access time standards. We find that NYNEX has demonstrated good cause for a waiver of the 1993 access time standards but that it is premature to consider any waivers of the 1995 standards.

13. Pursuant to Section 1.3 of the Commission's Rules, the Commission may waive any provision of its rules or orders on its own motion or on petition if good cause therefor is shown.[22] In supporting its case for a waiver, an applicant must demonstrate that there are special circumstances that warrant a deviation from the rule and must show how such deviation will serve the public interest.[23] We find that NYNEX has met this burden with respect to the 1993 access time standard.

14. The record shows that in response to the Reconsideration order, NYNEX has undertaken an ambitious SS7 deployment schedule. By March 1993, it will deploy Service Switching Points (SSPs) and SS7 interconnection capability in all of its access tandems and in 55% of its end offices. This deployment will enable NYNEX to comply substantially with the Commission's 1993 access time standards. Indeed, NYNEX's requests only that it be permitted an additional one half second in access time for five percent of its traffic. In addition, NYNEX will be able to reduce all of its access times to under 6.5 seconds, less than the 8.1 second maximum that the Reconsideration Order contemplated.

15. NYNEX asserts, further, that by March 1995, it will deploy SSPs and SS7 interconnection capability in 91% of its end offices, serving 76% of its originating 800 traffic.[24] Therefore, NYNEX's inability to meet the five second standard does not appear to be due to any deficiency or laxness in its SS7 deployment efforts. On the contrary, NYNEX has accelerated its end office SS7 plans beyond the levels contemplated by the access time standards and beyond its previous projected levels.

16. Moreover, it does not appear that it would be feasible for NYNEX to further accelerate its SS7 deployment so as to meet the 1993 access time standard. NYNEX states that in order to meet this standard, it would have to replace an additional 47 switches in 1992 and upgrade 137 others. It states that aside from the substantial cost of such changes (estimated to be $163 million), it would be physically impossible to accomplish them by March 1993.[25] We agree that it would be extremely difficult, if not impossible, for NYNEX to accomplish this work by March 1993 without seriously jeopardizing network reliability.[26]

17. We note, further, that since current NXX access times are longer than previously represented, the alternative access times proposed by NYNEX for March 1993 would not result in larger increases in access times than the five-second standard contemplated.[27] The Reconsideration Order effectively permitted maximum increases of 3.1 seconds or less for 97% of each LEC's traffic; even with this waiver, NYNEX would meet this parameter.[28] Thus, a waiver is fully consistent with the Commission's intent to allow "at the outset of 800 data base access a temporary and limited increase in access times, while requiring shortly thereafter that access times are reduced to levels at least as good as they are today."[29] Under the circumstances, we find that NYNEX has demonstrated good cause for a waiver of the 1993 access time standard.[30]

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occur. In reply, MCI argues that as the implementation process unfolds and LECs' and IXCs' network reconfiguration plans become more definite, carriers will provide the necessary access time information to end users. MCI states that the need for "exception lists," as recommended by ICA is "not obvious." MCI Reply at 6.

[22] 47 C.F.R. § 1.3.

[23] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990).

[24] NYNEX Petition at note 20.

[25] NYNEX Petition at 14.

[26] While some parties argue that LECs should be required to quantify the risks to network reliability before receiving waivers, such risks are inherently incapable of quantification. Virtually all parties agree that meeting the March 1993 deadline is in itself an ambitious undertaking. Parties also agree that considerable efforts must be made -- even with these waivers -- to ensure that all network changes are adequately tested and that the cutover to 800 data base access proceeds in an operationally sound and nondisruptive manner. *See, e.g.*, AT&T Comments at 6-7; NDC Reply at 4-5. Given the substantial amount of work that is already being perfomed under tight deadlines, we are satisfied that the additional network changes necessary to meet fully the 1993 five-second access time standard could not be accomplished without posing additional, undue risks to network reliability. That these incremental risks cannot be quantified in no way negates their significance.

[27] The five-second standard was not based on empirical data indicating that access times greater than five seconds are *per se* unacceptable. Rather, the standard was based on: (1) data indicating that data base system access times would be either 1 second or less, 4.1 seconds, 4.8 seconds, or 8.1 seconds; (2) a consensus among the parties that access times of 4.1 or 4.8 seconds could be achieved at far less cost than access times of 1 second; and (3) data showing current NXX access times to be either 1.9 or 3.5 seconds. All of these assumptions now turn out to be incorrect. The architectures that were thought to produce access times of 4.1 or 4.8 seconds sometimes result in access times of more than five seconds. Meeting the five second standard would thus be far more burdensome than previously thought.

[28] *See* para. 6, *supra;* letter from Susanne Guyer, Director Federal Regulatory Matters, NYNEX, to Donna Searcy, Secretary, FCC, *cited* at note 6, *supra*.

[29] 6 FCC Rcd at 5425.

[30] We note, also, that NYNEX has made available to the industry detailed information about its switch configurations and SS7 deployment plans so that NYNEX's access time capabilities can be determined on an end office-by-end office basis. Under the circumstances, the "exception list" sought by ICA is not necessary. To the extent users seek information about what access times actually will be under a data base system, this can be determined only when IXCs make available their network interconnection plans. We decline to defer consideration of NYNEX's waiver petition until all IXCs providing 800 service offer this information. We also note that the LECs have responded to the questions raised in the record about the methodology and assumptions used in the new access time tests, and we are satisfied that the access time data provided are reasonably reliable. *See* BOC/GTE Response to Comments on Implementation Plan for 800 Data Base Access Service, Appendix C. Finally, we reject NDC's argument that the LEC waiver petitions must be viewed as untimely petitions for reconsideration. Each of these petitions, including the NYNEX petition at hand, demonstrates good cause for a limited waiver of the 1993 access time standards. Moreover, a waiver is the appropriate procedural vehicle since the circumstances necessitating each waiver and the scope of each waiver request differ.

18. The Commission has time and again emphasized the importance of 800 number portability to consumers and to a fully competitive 800 services marketplace. Thus, for example, in the Reconsideration Order the Commission stated:

> Commenters representing a broad cross-section of interests have stressed, both in this proceeding and in our proceeding examining competition in the interstate interexchange marketplace, the importance of 800 number portability. We concur. The records in these proceedings demonstrate that number portability will not only increase competition in the 800 services marketplace, but provide customers with more flexibility and more options in designing their 800 service.[31]

The waiver that we now grant will help ensure that the public receives these significant benefits as quickly as possible. At the same time, given the limited scope of this waiver, we are confident that it will have only a minor impact on 800 access times.

19. In granting NYNEX its requested waiver of the 1993 access time standards, we emphasize that we require NYNEX to achieve the access time capabilities stated in its waiver petition. This means that NYNEX must deploy SSPs and SS7 interconnection in all of its access tandems and in 55% of its end offices by March 1993, and in 91% of its end offices by March 1995. In addition, NYNEX must fulfill its commitment to deploy, upon availability, the AT&T and Northern Telecom software patches so as to reduce access times for the affected switches to the maximum extent possible.[32]

20. We deny, without prejudice, NYNEX's request for a waiver of the 1995 standard. While NYNEX might be able to demonstrate in the future that good cause exists for a waiver of the 1995 requirements, it is premature to consider such a waiver request at this time. We note that LEC SS7 deployment plans have changed substantially over the course of the last few years, and it is likely that further changes will occur. Moreover, technological developments, including switching software upgrades that are not currently available, may render NYNEX's 1995 waiver request unnecessary. For example, Southwestern Bell notes in its waiver petition that it is working with switch vendors to explore the feasibility of software patches for the DMS-10 and 2B ESS switches.[33] If such patches become available, NYNEX may be able to meet the 1995 access time standard without replacing these switches. Therefore, NYNEX has not demonstrated good cause at this time for a waiver of the 1995 access time standards.

VI. ORDERING CLAUSE

21. Accordingly, pursuant to the authority contained in Sections 0.91(a) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 (a) and 0.291, IT IS ORDERED that the petition for waiver filed March 2, 1992, by NYNEX IS HEREBY GRANTED IN PART AND DENIED IN PART as described in this order.

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[31] 6 FCC Rcd at 5426 (footnote omitted).

[32] *See* note 5, *supra*.

[33] *See* Southwestern Bell Petition for Waiver, filed March 27, 1992, at 6.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of

Provision of Access
for 800 Service

ORDER

Adopted: July 28, 1992; Released: July 28, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 27, 1992, Southwestern Bell Telephone Company (SWBT) filed a petition for waiver of the access time standards for 800 data base access, established in the Memorandum Opinion and Order on Reconsideration in this docket.[1] SWBT also asks, in the alternative, for a narrower waiver of the March 1993 access time standards, coupled with an extension of the March 1993 compliance date to December 31, 1993. We now grant SWBT a waiver of the March 1993 access time standard but deny, without prejudice, its request for a waiver of the 1995 standards. We also deny SWBT's alternative request for an extension of the March 1993 compliance date.

II. BACKGROUND

2. The Reconsideration Order established revised access time standards for the implementation of the 800 data base system. Under the revised standards, each local exchange carrier (LEC) may replace the current NXX access system with mandatory data base access when that LEC can reduce access times for 97% of its originating 800 data base access traffic to five seconds or less, provided that, within two years thereafter, (a) none of its 800 data base traffic experiences an access time of greater than five seconds, and (b) the mean access time for all of its 800 data base traffic is 2.5 seconds or less. The Commission required the Bell Operating Companies (BOCs) and GTE to meet the first tier requirement (the 5-second/97% standard) by March 1993.[2]

3. The revised standards reflected a careful balancing of the benefits of the data base system, most notably, 800 number portability, with the costs of increased access delays. They were also the product of undisputed industry data about access times under both the current NXX system and the data base system. In particular, the Commission relied on an industry consensus at the time that: (1) access times under NXX access are 1.9 seconds, if the IXC interconnects at the end office, and 3.5 seconds, if the IXC interconnects at a tandem; (2) about 2/3 of current NXX traffic is delivered directly from the end office (so that the mean access time today is about 2.5 seconds); and (3) access times under a data base system would be 0.8 seconds, 1.0 seconds, 4.1 seconds, 4.8 seconds, or 8.1 seconds, depending upon the configuration of the originating LEC's network and the level of SS7 deployment in that network.[3]

III. SWBT'S WAIVER PETITION

4. SWBT states that following the release of the Reconsideration Order, and as it began implementing its data base system, it began testing access times using different end office and access tandem switch types. It claims that these tests revealed that, both for NXX access and data base access, access times vary by switch type and that certain digital switches produce longer access times than older switches, which had been used for earlier access time testing.[4] For NXX access, the tests showed that access times range from 1.5 to 3.1 seconds for end office connections and 3.3 to 5.8 seconds for access tandem connections.[5] For data base access, the tests showed that SWBT would not be able to meet the Commission's five second standard simply by implementing SS7 interconnection at access tandems. In light of these test results, SWBT asks for a waiver of the 1993 and 1995 access time standards. The following chart sets forth the access times SWBT proposes.[6]

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[1] *See* Provision of Access for 800 Service, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991) (*Reconsideration Order*). As defined in the Reconsideration Order, "access time" is the time that begins when the caller completes dialing an 800 call and ends when the call is delivered by the originating local exchange carrier (LEC) to an interexchange carrier (IXC). Callers experience additional delay as the IXC then completes the call through its network and the terminating LEC's network to the 800 subscriber. *Id.* at note 4.

[2] 6 FCC Rcd at 5425.

[3] 6 FCC Rcd. at 5422-23, 5425.

[4] *See* SWBT Petition at 7. *See also* Bellcore 800 Database Access Time Study, Special Report SR-NWT-002251, Issue 1, February 1992. The Bellcore Access Time Study was attached as an appendix to the BOC/GTE 800 Data Base Implementation Plan, filed March 2, 1992.

[5] *See* Bellcore Access Time Study, *supra* at 21. *See also* letter from William A. Blase, Director, Federal Regulatory, SWBT, to Donna Searcy, Secretary, FCC, June 5, 1992.

[6] These access time projections represent SWBT's capabilities -- not the actual access times that will occur. In other words, these data assume that IXCs use SS7 interconnection wherever SWBT makes it available. If some IXCs do not elect to use SS7 interconnection, those IXCs' access times will be longer. These projections also assume, of course, that the 800 data base implementation process proceeds as planned, and in particular, that LEC/IXC SS7 interconnection testing and trunk conversions scheduled over the next six to eight months occur on schedule. Finally, these projections assume the installation of a software patch in certain Northern Telecom and AT&T switches that will reduce access times for those switches by up to a second or more. The Northern Telecom patch is currently available; the AT&T patch is scheduled for availability in November or December 1992.

Date	Percentage of Traffic Less Than: 5 Seconds	5.5 Seconds	6 Seconds	6.5 Seconds	Mean
3/93	72	81	95	100	4.4
3/95	94		95.4	100	<1.4

5. SWBT argues that because NXX access times are in many cases longer than had been previously represented, its waivers would not result in access time increases in excess of those contemplated by the Commission when it adopted a 5-second access time standard.[7] SWBT claims, further, that while it cannot meet the Commission's five-second standard for 1993 or 1995, it will exceed FCC access time standards in other respects. For example, it states that by March 1993, it will deploy SS7 interconnection in all of its access tandems and will be capable of limiting all access times to 6.3 seconds or less, which is less than the 8.1 second maximum that the Reconsideration Order contemplated. In addition, SWBT states that it will be capable of achieving a mean access time in 1995 of 1.1 seconds.[8]

6. SWBT claims that it has already substantially accelerated its network deployment plans and cannot meet the March 1993 access standard without jeopardizing network reliability. It states that in order to meet the 1995 access time standard, it would have to upgrade or replace all of its 2B ESS and DMS-10 switches, at a cost of $200 million or more. It argues that it would be unreasonable to force SWBT to incur this expense, considering that this work would reduce access times for six percent of its traffic by from .5 to 1.3 seconds.[9]

7. As an alternative to its requested waiver of the 1993 access time standard, SWBT asks for a more limited waiver, coupled with an extension of the deadline for mandatory data base implementation from March 1993 to December 31, 1993. SWBT states that if we allow this extension, it would be capable of offering access times of five seconds or less for 91% of its traffic at that time. In addition, it states, its mean access time could be reduced to 2.1 seconds.[10] SWBT states that extending the implementation timetable would also allow more time for testing and trunk conversions, thereby increasing network reliability.[11]

IV. POSITIONS OF OTHER PARTIES

8. Commenting parties address SWBT's request for a waiver of the access time standards in conjunction with the waiver requests filed by other LECs. AT&T, CompTel, NDC, and ARINC oppose the access time waivers. VISA also opposes the waivers, pending more detailed information on their impact on users. USTA and Centel support a waiver of the access time standards without indicating whether they also support extending the implementation date to December 1993. Sprint also supports a waiver of the access time standards, as does MCI, although MCI limits its support to a waiver of the 1993 access time standard.[12] MCI, Sprint, and CompTel oppose SWBT's request for a delay in 800 data base implementation, while US West supports it. Other parties, including Ad Hoc, ICA, and Cable & Wireless neither support nor oppose the waivers in their comments, pending further information.[13]

9. Parties that oppose the waivers claim that the LECs do not adequately support their claims that waivers are necessary and warranted. For example, AT&T argues that LEC claims as to the cost of complying with the access time standards are not substantiated.[14] Similarly, CompTel and ARINC assert that LECs have not demonstrated that acceleration of their SS7 deployment $plans would jeopardize network reliability.[15] They argue that waivers should not be granted unless LECs provide more detailed substantiation of LEC network reliability concerns, including quantification of the risks of outages or increased blockage. AT&T and ARINC claim, further, that the waivers would upset the careful balancing of interests incorporated into the access time standard and would degrade the quality of 800 access service.[16] In addition, several parties state that LECs did not provide sufficient information about the parameters of the tests underlying the new access time estimates. The argue that without this information, they cannot assess the accuracy or completeness of the revised data or its impact on IXCs or end users.[17] Finally, NDC argues that the waivers are really untimely petitions for reconsideration of the access time standard insofar as they assume the invalidity of that standard.[18]

10. Parties supporting a waiver of the access time standard claim that the small increase in access times that the waivers would permit is acceptable, at least for March 1993.[19] MCI urges that the Commission grant a blanket waiver that would permit LECs to implement mandatory data base access when 95% of their traffic experiences an access time of 6 seconds or less.[20] MCI opposes LEC requests for a waiver of the 1995 access time standards, claiming that it is premature to address these requests at this time, particularly since technological developments and changed network deployment plans may render these waivers unnecessary.[21]

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[7] Letter from William A. Blase, Director, Federal Regulatory, SWBT, to Donna Searcy, Secretary, FCC, June 5, 1992.

[8] SWBT Petition at 1-2.

[9] SWBT Petition at 6.

[10] SWBT Petition at 12-13.

[11] SWBT Petition at 3.

[12] *See* MCI Comments at 3-6. Sprint initially opposed US West's waiver request but withdrew its opposition in light of the representations made in US West's Reply Comments. *See* letter from Norina Moy, Manager, Federal Regulatory Affairs, US Sprint, to Donna Searcy, Secretary, FCC, May 22, 1992.

[13] ICA asks us to establish a second pleading cycle on the waiver petitions following receipt of the BOC/GTE Reply to comments on the BOC/GTE 800 Data Base Implementation Plan. ICA Comments at 7.

[14] AT&T Comments at 4.

[15] CompTel Comments at note 7; ARINC Comments at 9.

[16] AT&T Comments at 3-5; ARINC Comments at 1-5.

[17] *See, e.g.*, AT&T Comments at 5-6; CompTel Comments at 4-5; Allnet Comments at 1-2; ICA Comments at 5-6; NDC Reply at 3.

[18] NDC Reply at 6-7.

[19] *See* USTA Comments at 2-3; MCI Comments at 6; Sprint Comments at 13. *Cf.* Ad Hoc Comments at 6 ("A *slight* slippage of access time standards is not itself a terribly adverse matter.")

[20] MCI Comments at 6.

[21] In reply to MCI's Comments, some LECs indicated that they did not oppose a deferral of the 1995 waivers at this time. *See, e.g.*, NYNEX Reply at note 9; US West Reply at 16-17.

11. MCI, along with Sprint and CompTel, also oppose SWBT's request for a deferral of the implementation date from March to December 1993. They argue that this extension would unreasonably delay the benefits of number portability.[22]

12. Parties that neither support nor oppose the waivers express more concern about the reliability and firmness of the access time data set forth in the LEC waivers than with the revised access time standards proposed in the waiver petitions.[23] Most of these parties echo AT&T's concern that insufficient information was provided about how the access time tests were conducted, information that they claim is essential to an assessment of the reliability of these tests.[24] In addition, Ad Hoc notes that some LECs did not specifically commit to achieving the access times set forth in their waiver petitions, and it asks for such commitments.[25] Other parties ask for more information about the extent to which nonconforming access times would exceed five seconds and the geographic distribution of traffic with higher access times.[26]

V. DISCUSSION

13. We now grant SWBT's requested waiver of the 1993 access time standards but deny, without prejudice, its request for a waiver of the 1995 access time standards. In addition, we deny SWBT's request that we extend the deadline for data base implementation to December 1993.

14. Pursuant to Section 1.3 of the Commission's Rules, the Commission may waive any provision of its rules or orders on its own motion or on petition if good cause therefor is shown.[27] In supporting its case for a waiver, an applicant must demonstrate that there are special circumstances that warrant a deviation from the rule and must show how such deviation will serve the public interest.[28] We believe that SWBT has met this burden with respect to the 1993 access time standard.

15. The record demonstrates that in response to the Reconsideration Order, SWBT has undertaken an aggressive SS7 deployment program. As a result of this program, by March 1993, SWBT will equip several of its end offices with SS7 capabilities and will offer SS7 interconnection from all of its access tandems. The record demonstrates, further, that SWBT will continue with this aggressive program after March 1993, and that by March 1995, it will be able to achieve a mean access time of 1.4 seconds, substantially below the maximum allowed. Under the circumstances, SWBT's difficulty in meeting FCC access time standards cannot be attributed to any deficiency or laxness in its SS7 deployment efforts.

16. Indeed, it appears that it would be virtually impossible for SWBT to meet fully the 1993 five-second access time standard in a timely manner. SWBT states that in order to meet this standard, it would have to replace or upgrade a substantial number of 2B ESS and DMS-10 switches, which are SS7-incompatible, deploy SS7 interconnection at some 400 additional end offices and access tandems, and convert approximately 200,000 IXC access trunks (four times the number of trunks that would have to be converted if SWBT's waiver is granted).[29] It states, further, that it would have to deploy SS7 signaling between end offices and access tandems in the majority of its network configurations.[30] We agree that this work could not be performed by March 1993 without posing a significant threat to network reliability.[31]

17. At the same time, since current NXX access times are longer than previously represented, the alternative access times proposed by SWBT would not result in larger increases in access times than the five-second standard contemplated.[32] The Reconsideration Order permitted maximum increases of 3.1 seconds or less for 97% of each LEC's traffic; even with this waiver, SWBT would meet this standard. Thus, a waiver is fully consistent with the Commission's intent to allow "at the outset of 800 data base access a temporary and limited increase in access times, while requiring shortly thereafter that access times are reduced to levels at least as good as they are today."[33]

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[22] MCI Comments at 2-3; Sprint Comments at 8-9; CompTel Comments at note 5.

[23] *See, e.g.*, Ad Hoc Comments at 7-11.

[24] *See, e.g.*, Cable & Wireless Comments at Appendix 1, Ad Hoc Comments at 10-11.

[25] Ad Hoc Comments at 9.

[26] *See, e.g.*, ICA Comments at 7-11. *See also* NDC Comments at 9-12; VISA Comments at 3-7. ICA states that each LEC should be required to make available "exception lists" showing each end office where access delays in excess of 5.5 seconds may occur. In reply, MCI argues that as the implementation process unfolds and LECs' and IXCs' network reconfiguration plans become more definite, carriers will provide the necessary access time information to end users. MCI states that the need for "exception lists," as recommended by ICA is "not obvious." MCI Reply at 6.

[27] 47 C.F.R. § 1.3.

[28] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990).

[29] SWBT Petition at 17-18.

[30] SWBT Petition at 13.

[31] While some parties argue that LECs should be required to quantify the risks to network reliability before receiving waivers, such risks are inherently incapable of quantification. Virtually all parties agree that meeting the March 1993 deadline is in itself an ambitious undertaking. Parties also agree that considerable efforts must be made -- even with these waivers -- to ensure that all network changes are adequately tested and that the cutover to 800 data base access proceeds in an operationally sound and nondisruptive manner. *See, e.g.*, AT&T Comments at 6-7; NDC Reply at 4-5. Given the substantial amount of work that is already being perfomed under tight deadlines, we are satisfied that the additional network changes necessary to meet fully the 1993 five-second access time standard could not be accomplished without posing additional, undue risks to network reliability. That these incremental risks cannot be quantified in no way negates their significance.

[32] The five-second standard was not based on empirical data indicating that access times greater than five seconds are *per se* unacceptable. Rather, the standard was based on: (1) data indicating that data base system access times would be either 1 second or less, 4.1 seconds, 4.8 seconds, or 8.1 seconds; (2) a consensus among the parties that access times of 4.1 or 4.8 seconds could be achieved at far less cost than access times of 1 second; and (3) data showing current NXX access times to be either 1.9 or 3.5 seconds. All of these assumptions now turn out to be incorrect. The architectures that were thought to produce access times of 4.1 or 4.8 seconds sometimes result in access times of more than five seconds. Meeting the five second standard would thus be far more burdensome than previously thought.

[33] 6 FCC Rcd at 5425.

Under the circumstances, we find that SWBT has demonstrated good cause for a waiver of the 1993 access time standard.[34]

18. In granting SWBT its requested waiver of the 1993 access time standard, we emphasize that we require SWBT to achieve the access time capabilities represented in its waiver petition. In addition, SWBT must fulfill its commitment to deploy, upon availability, the AT&T and Northern Telecom software patches so as to reduce access times for the affected switches to the maximum extent possible.[35]

19. We deny, without prejudice, SWBT's request for a waiver of the 1995 access time standard. While SWBT might be able to demonstrate in the future that good cause exists for a waiver of the 1995 requirements, it is premature to consider such a waiver request at this time. We note that LEC SS7 deployment. plans have changed substantially over the course of the last few years, and it is likely that further changes will occur. Moreover, technological developments, including switching software upgrades that are not currently available, may render SWBT's 1995 waiver request unnecessary. Indeed, SWBT notes that it is working with switch vendors in an effort to develop a patch for the DMS-10 and 2B ESS switches, which could enable SWBT to meet the 1995 access time standards. Therefore, SWBT has not demonstrated good cause at this time for a waiver of the 1995 access time standards.

20. We also deny SWBT's alternative request that we extend the March 1993 deadline to December 1993. We believe that the March 1993 deadline can be met by all LECs without compromising network quality or network reliability. Indeed, most of the industry has been working diligently in order to meet the March 1993 deadline and several LECs will exceed aspects of the Commission's access time requirements for that date. SWBT has not shown that it cannot meet the March 1993 deadline, much less that the deadline should be extended for the entire industry.[36]

21. The Commission has time and again emphasized the importance of 800 number portability to consumers and to a fully competitive 800 services marketplace. Thus, for example, in the Reconsideration Order the Commission stated:

> Commenters representing a broad cross-section of interests have stressed, both in this proceeding and in our proceeding examining competition in the interstate interexchange marketplace, the importance of 800 number portability. We concur. The records in these proceedings demonstrate that number portability will not only increase competition in the 800 services marketplace, but provide customers with more flexibility and more options in designing their 800 service.[37]

Because of the significant benefits that 800 number portability will bring to 800 services, the public interest would not be well-served by extending the implementation date for the data base system to December 1993.

VI. ORDERING CLAUSE

22. Accordingly, pursuant to the authority contained in Sections 0.91(a) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91(a) and 0.291, IT IS HEREBY ORDERED that the petition for waiver filed by SWBT on March 27, 1992 IS GRANTED IN PART AND DENIED IN PART, as described in this order.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[34] We note, also, that SWBT has made available to the industry detailed information about its switch configurations and SS7 deployment plans so that SWBT's access time capabilities can be determined on an end office-by-end office basis. Under the circumstances, the "exception list" sought by ICA is not necessary. To the extent users seek to information about what access times actually will be under a data base system, this information can be provided only when IXCs make available their network interconnection plans. We decline to defer consideration of SWBT's waiver petition until all IXCs providing 800 service in SWBT territory offer this information. We also note that the LECs have responded to the questions raised in the record about the methodology and assumptions used in the new access time tests, and we are satisfied that these test results are reliable. *See* BOC/GTE Response to Comments on Implementation Plan for 800 Data Base Access Service, Appendix C. Finally, we reject NDC's argument that the LEC waiver petitions must be viewed as untimely petitions for reconsideration. Each of these petitions, including the SWBT petition at hand, demonstrates good cause for a limited waiver of the 1993 acccess time standard. Moreover, waivers are an appropriate procedural vehicle because the circumstances necessitating each waiver and the scope of each waiver request differ.

[35] *See* note 6, *supra*.

[36] While the Commission could allow SWBT, but not other LECs, more time to implement the data base system, this would necessitate a complex "regional" approach to 800 number portability that would compromise the benefits of number portability and also present difficult administrative problems.

[37] 6 FCC Rcd at 5425 (footnote omitted).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-135

In the Matter of

Regulatory Reform for
Local Exchange Carriers
Subject to Rate of Return
Regulation

NOTICE OF PROPOSED RULEMAKING

Adopted: June 18, 1992; Released: July 17, 1992

COMMENTS DUE: August 28, 1992
REPLY COMMENTS DUE: September 28, 1992

By the Commission:

TABLE OF CONTENTS

	Paragraph
I. INTRODUCTION	1
II. BACKGROUND	5
A. Composition of the LEC Industry	5
B. The *LEC Price Caps Order*	8
III. DISCUSSION	9
A. Optional Incentive Regulation Plan	9
1. Summary	9
2. Discussion	10
a. Frequency of Tariff Filings	10
b. Earnings Band	11
c. Cost Basis for Incentive Plan Tariffs	13
d. New Service	16
e. Pricing Flexibility	17
f. Infrastructure and Service Quality Reporting	20
g. Eligibility and Optional Basis	22
B. Historical Cost Tariffs for Small Companies (Section 61.39)	27
1. Summary	27
2. Discussion	28
C. Baseline Rate of Return Regulation Based on Prospective Costs (Section 61.38 and Part 69)	38
1. Current Rules	38
2. Proposed Revisions	42
D. Incentive Regulation and Regulatory Reform within NECA	46
E. Mergers and Acquisitions Under the Incentive Plan	49
IV. COMMENTS; PROCEDURAL RULES	51
V. ORDERING CLAUSES	57

I. INTRODUCTION

1. This Notice of Proposed Rulemaking continues the examination of improved regulatory regimes for small and mid-size local exchange carriers (LECs) as announced in the *LEC Price Caps Order*.[1] This Notice proposes regulatory reform for interstate services offered by small and mid-sized LECs that remain subject to rate of return regulation in the wake of our adoption of a price cap system for the largest LECs.[2] The proposed rules are intended to complement the price cap system by providing incentives for smaller companies to become more efficient and by encouraging technological development. Because these smaller companies provide service primarily to rural areas, this proposal will help bring ratepayer benefits gained from incentive regulation to rural Americans as well as urban populations served by the largest carriers.

2. Price cap regulation applies to 12 carriers, representing approximately 93 percent of the LEC industry total revenues. The approximately 1300 remaining carriers remain under rate of return regulation. The size, diversity, and regulatory history of this group presents substantial challenges to designing incentive-based regulatory reforms. First, these carriers have not elected to be regulated under the price cap plan. They appear to be adverse to the heightened risks inherent in a price cap system that requires prices to track a price cap over which the carrier has no control. Second, the regulatory history of these carriers, with the vast majority of them participating in the National Exchange Carrier Association (NECA) pooled rates, means that the Commission has not had direct carrier-by-carrier oversight of costs. When we adopted price cap regulation, it was our ability to analyze large carrier costs and prices that enabled us to adopt a price cap system that creates benefits for both ratepayers and carriers. Finally, carriers that remain under rate of return represent a diverse group of companies, from extremely

[1] Second Report and Order, 5 FCC Rcd 6786, 6827 (1990) and Erratum, 5 FCC Rcd 7664 (1990)(Erratum by Com.Car.Bur.) (*LEC Price Caps Order*), *modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modified on recon.* 6 FCC Rcd 4524 (1991) (*ONA Part 69 Order*), *petitions for recon. of ONA Part 69 Order pending, appeal docketed, D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[2] In developing this proposal, we have worked closely with members and representatives of the LEC industry, NECA, and interexchange carriers.

small rural cooperatives to large, multi-state holding companies. Therefore, a price caps approach for these companies does not seem appropriate at this time.

3. We tentatively conclude that the preferred approach for regulatory reform for this segment of the LEC industry is a continuum of increasingly incentive based approaches that permit companies to choose a plan which best fits their circumstances. At each point along this continuum, regulatory reforms would be introduced to correct the efficiency disincentives that traditional, cost-plus regulation introduces. Carriers will be able, based upon their own unique characteristics, to move along the continuum toward price cap regulation as they choose. While each step may increase business risks, it also promises increased rewards in the form of the potential for higher earnings and reduced administrative burdens. Efficiencies gained can be captured for ratepayers in subsequent tariff reviews. At the same time, the greater earnings realized by efficiency gains benefit shareholders and enhance the company's investment potential. We are committed to maintaining revenue neutrality among the options established in this rulemaking so that the mere election of a regulatory system does not affect the company's revenues.

4. This Notice addresses regulatory reform in three parts. The first part proposes an optional incentive plan for rate of return carriers that is designed as an intermediate step on the road to price cap regulation. The small company rules permit LECs serving 50,000 lines or fewer to develop traffic sensitive rates based on historical costs. The second part proposes to expand these rules to use historical costs to compute common line rates. Under the third part, we propose to streamline the basic rate of return regulation that would apply to companies not electing any of the optional regulatory plans. The third part of our proposal, while representing a substantial improvement in the regulatory structure for the 1300 small and mid-sized carriers, is a first, and not a final step in long term regulatory reform for these companies. In our efforts to adapt our regulations to changing communications needs, we will continue to explore alternative ways to assure customers receive quality services at reasonable costs.

II. BACKGROUND

A. Composition of the LEC Industry

5. Price cap regulation took effect for the largest LECs on January 1, 1991. Twelve of the sixteen LECs with more than 500,000 access lines participate in price cap regulation. Although price cap regulation is mandatory for eight of these LECs, four elected to become subject to price caps. Although none of the smaller LECs has selected price caps regulation, a substantial majority of telephone customers are now served by price caps companies.[3]

6. With all of the largest LECs subject to price caps regulation, the remaining companies, subject to rate of return regulation, may be divided into "small" and "mid-size" carriers. In general, small companies are locally owned and operated LECs, organized as closed corporations, cooperatives or mutuals. These small carriers fall within NECA Subset 3 definition -- annual revenues of less than $40 million -- and serve fewer than 50,000 access lines. The "mid-size" companies generally have multiple telephone company subsidiaries. The larger mid-size companies' stock is publicly traded; and, for the most part, these companies operate in more than one state.

7. Of the LECs that remain subject to rate of return regulation, almost all participate in the common line (CL) pool administered by NECA. In a pooling environment, rates are based upon the total costs and total demand of all participating companies. Each company receives its actual costs, plus its share of the pool's earnings. The major reason companies participate in pools is that the mechanism inherently enables sharing of risks, by providing a high degree of assurance that the company will recover its costs. The majority of the LECs participate in the NECA traffic sensitive (TS) pool. The rates for these pools and other small and mid-size company tariffs under Section 61.38 of the rules are based on projections of the LECs' allowable costs and demand. Of the 1308 local exchange study areas[4] that are not subject to price cap regulation, 1197 participate in the NECA traffic sensitive pool; and 1253 are included in the NECA common line pool. Thirty-nine small companies maintain traffic sensitive tariffs under Section 61.39 rules, outside of the NECA pool. Approximately 2.2 percent of the total LEC study areas (761 study areas) are average schedule companies;[5] 243 of these companies are cooperatives.

B. The *LEC Price Caps Order*

The *LEC Price Caps Order* stated that the Commission would "initiate further proceedings dealing specifically with regulatory issues of concern to small and mid-size LECs."[6] That Order further stated the Commission's intent to consider whether a lower productivity factor for small and mid-size LECs is appropriate "to provide a focused basis for their participation in price cap regulation."[7] As stated above, no small carriers and only four mid-size carriers have elected price caps. This may be due to their smaller size and inability to gain economies of scale and scope that could spread the risks associated with price caps over a greater economic base. The Order also committed

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[3] Companies under price caps regulation represent 92.4 percent of the total access lines. Approximately 94.7 percent of the access minutes are reported by price caps companies. Price caps companies generate 93.7 percent of the total LEC industry revenue requirement. (1990 NECA data filed with the Commission).

[4] "Study areas" are, generally, a LEC's service area in a given state. The study area boundaries are frozen as of November 15, 1984. MTS and WATS Market Structure, Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72, 80-286, 86-297, *Order on Reconsideration and Supplemental Notice of Proposed Rulemaking*, 2 FCC Rcd 5349 (1987). (A Notice of Proposed Rulemaking to revise the definition of a study area is pending).

[5] Participating LECs receive monies from the NECA pools based upon their costs pursuant to cost studies (cost companies) or pursuant to the average schedules (average schedule companies). Thus, average schedule companies do not perform cost studies for rate making. These companies receive their interstate revenues from the NECA pools based on formulae developed by NECA and subject to the approval of the Commission. *See* 47 C.F.R. § 69.606.

[6] Second Report and Order, 5 FCC Rcd 6786, 6827 (1990).

[7] *Id.*

to examine other regulatory options that "recognize the unique circumstances" facing smaller LECs.[8] Finally, the Order committed to a continued examination of small company issues "to ensure that desirable regulatory reforms are applied to small telephone companies as far as possible and applied with sensitivity to their special circumstances."[9]

III. DISCUSSION

A. Optional Incentive Regulation Plan

1. Summary

9. The optional incentive plan proposed in this Notice would be available to any non-price cap LEC that also participates in no NECA pool. In comparison to current rate of return regulation methodologies, the optional incentive plan we propose incorporates longer tariff periods, greater reliance on historical costs, broader earnings bands and greater pricing flexibility. The plan includes both price cap concepts, such as earning zones and rate flexibility, and a lagged rate of return. Every two years, rates would be recalculated based upon costs and demand established during an historical period. During the two years, carriers operating pursuant to this plan would have the incentive to keep costs from increasing because cost increases lessen their earnings while cost decreases permit greater earnings. In recognition of the lower risk this plan entails, benefits to carriers would be less than with full price cap regulation. It is also anticipated that this plan will serve as a transitional step for companies who eventually elect to participate in full price caps regulation.

2. Discussion

a. Frequency of Tariff Filings

10. Among the goals of our regulatory reform are simplification and the reduction of unnecessary regulatory burdens. One of the more substantial regulatory burdens that many LECs bear is the requirement to make annual tariff filings pursuant to Section 69.3 of the Commission's Rules. Based on our experience with biennial filings for the smallest carriers under Section 61.39 and our review of company-specific tariffs filed by rate of return carriers, we tentatively conclude that requiring tariff filings every two years under the incentive plan will substantially reduce regulatory burdens, simplify the tariff process, and still permit the Commission to scrutinize rates to meet our statutory obligations under the Communications Act. We request comment on whether companies electing participation in the incentive plan should retain the option of filing revisions within the two-year period. While the efficiency benefits of regulatory lag are strongest if prices are held constant, smaller carriers may experience cost changes that would render rates unreasonable. One possible solution is to permit a company seeking mid-term changes to bear a heavy burden of proving that cost changes render their current rates unreasonable.

b. Earnings Band

11. An integral part of the price caps plan is the earnings band which permits companies that lower costs by realizing efficiencies to retain the resulting higher earnings as a reward for the efficiencies gained. Under price caps, this potential reward is balanced by the potential risk that, if efficiencies are not realized, the carrier would experience cost increases which would yield lower earnings. Another balancing risk for price cap carriers is created by the requirement that carriers remain under price cap regulation. We tentatively conclude that an approach similar to the price cap earnings band is appropriate for this optional incentive plan. However, because this incentive plan entails less risk than price caps, we tentatively conclude that it must provide less reward.

12. The earnings zone for price cap carriers was initially defined using the authorized rate of return as a basis. Under price caps, a 300 basis point earning zone was defined, which permitted a carrier to retain earnings of 200 basis points above the initial prescribed level, and a portion of the earnings above that amount through the sharing mechanism.[10] For price cap carriers, earnings must fall below 100 basis points for 12 months before a mid-course correction may be filed, which would retarget rates to earn 100 basis points below the baseline rate of return. Under price caps an adjustment in the authorized rate of return would not directly affect the earning zones. Such a change in the rate of return, however, would affect the earning zone for carriers participating in this optional incentive plan. Under the plan, carriers would continue to target their rates at each biennial filing to the prescribed rate of return. We tentatively conclude that an appropriate earning zone for the incentive plan would extend from 100 basis points below the authorized rate of return, to 100 basis points above the authorized rate of return. We seek comment on this tentative conclusion and recommendations for the appropriate level of earnings, expressed in basis points above and below the authorized rate of return, that carriers should be permitted to retain under the plan. We also seek comment on whether to subject earnings over this amount to sharing requirements, as we do in price caps.[11]

c. Cost Basis for Incentive Plan Tariffs

13. Companies participating in this incentive plan would base their first tariff filing on a cost of service study for the most recent 12 month period with related demand data for the same period. Subsequent filings would be based on similar cost and demand information for all elements for the period since the carrier's last filing.

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[8] *Id.*

[9] *Id.*

[10] *LEC Price Caps Order*, at 6801-02. The sharing mechanism under price caps permits carriers with earnings in excess of the earning zone to "share" a portion of the over earnings by refunding a portion of the excess earnings in the form of rate reductions.

[11] Enforcement issues generally should be addressed in CC Docket No. 92133, Amendment to Parts 65 and 69 of the Commission's Rules to reform the Interstate Rate of Return Represcription and Enforcement Processes. Comments on sharing here are solicited only for the optional incentive plan.

14. Because this plan creates lower risks than the price cap plan, carriers would be permitted, at the time of their biennial filings, to argue for the inclusion of additional costs that are known and measurable if such costs would otherwise cause the carrier to fall short of earning the minimum level. If the carrier shows that these costs would result in a short fall, the carrier would be required to target its rates to recover revenues at the low end of the permissible earnings band, i.e., 100 basis points below the authorized rate of return. Showings of such known and measurable costs would be subject to a higher burden than purely historical cost showings. Under price cap regulation, costs triggered by action beyond the control of the carrier -- exogenous costs -- result in adjustment to the cap. The intent of the exogenous cost treatment under price caps is to assure that the price cap formula does not lead to unreasonably high or low rates.[12] We tentatively conclude that consideration of exogenous cost changes, as defined under price caps, should be factored into the rates of LECs participating in the proposed incentive plan. Carriers would therefore be able to include exogenous adjustments as well as other known and measurable changes in justifying new rate levels. Comment is sought on this proposal. Commenters should specifically suggest what types of costs would be properly recognized as "known and measurable".

15. This cost showing standard for carriers electing to file tariffs under the incentive plan would remove a substantial amount of uncertainty, as well as challenges to the support showings, by relying more heavily on historical costs. The reliance on historical costs for two-year periods would also encourage companies to operate with greater efficiencies because efficiencies gained result in greater earnings for the tariff period. Under the plan, except as otherwise provided, at the time of the biennial filing, rates would be targeted to the authorized interstate rate of return for the initial filing and for each subsequent filing.

d. New Services

16. Most carriers eligible to participate in this incentive plan serve areas contiguous with large companies that operate in a price cap environment and that have introduced a number of new services in recent years. The offering of new services by price cap carriers places competitive pressure upon neighboring exchange carriers to provide the same or similar services. Although the incentives created by this plan are in part dependent upon reliance on historical costs, we should include provisions to address the introduction of new services by incentive plan companies. The required cost support showing for new service offerings provided in Section 61.38 of our rules would be inconsistent with our objectives of simplification and reducing regulatory burdens. More consistent with these objectives would be to provide some streamlining of rules for the introduction of new services under the plan. However, some guidelines for offering new services are necessary to assure that such offerings do not defeat the incentive structure of the plan. We therefore propose to permit carriers subject to the incentive plan to introduce new services with a presumption of lawfulness if the anticipated earnings are *de minimis* and do not exceed the rate charged by the geographically closest price cap regulated LEC[13] offering the same or similar service. At the end of twelve months, the carrier must calculate rates for the new service based upon the historical costs for that service. New service offerings for carriers under the incentive plan that do not fit within these parameters, would require the standard Section 61.38 showing. We tentatively conclude that 2 percent or less of a non-price cap company's total annual operating revenue is *de minimis* for purposes of the introduction of new services and seek comment on this conclusion as well as other methods of treating new services.

e. Pricing Flexibility

17. In order to respond to competitive pressures from neighboring price cap LECs, many rate of return regulated LECs may require a degree of pricing flexibility. Some degree of pricing flexibility is consistent with an incentive plan so that companies can more easily respond to underlying service cost changes resulting from efficiency gains.

18. We propose to incorporate a pricing flexibility element into the incentive plan that would include a "basket" and "service category" system similar to that of price caps. We propose three baskets in the incentive plan: common line, switched traffic sensitive, and special access with categories of services within each basket. Within each two-year tariff period, aggregate rates for each basket must remain unchanged. However, carriers may adjust rates within each service category by no more than 10 percent up or down during the two-year tariff period. Filings of rate adjustments that are within the limits set herein would be permitted on 14 days' notice, with a presumption of lawfulness if accompanied by a showing of revenue neutrality; *i.e.*, that, absent a change in demand, the rate changes would generate the same revenue in each basket. Comment is sought on this proposal and the parameters contained therein.

19. We tentatively conclude that this approach for pricing flexibility within this incentive plan is consistent with our objectives; however, we seek comment on whether there should also be a lower limit for pricing flexibility. Comments endorsing a lower limit should present their arguments with specificity. Comments opposing a lower limit should state why predatory pricing would not arise.

f. Infrastructure and Service Quality Reporting

20. One of the primary objectives of this plan is to encourage carriers to operate with greater efficiency. Incentive regulation has, however, raised concerns that a company may simply pursue the most cost effective means to accomplish a task to the detriment of service quality and ultimately to the company's infrastructure. Such a course of action would yield higher earnings for the company but would cause harm to its ratepayers.

21. Monitoring the service quality and infrastructure development of companies that elect participation in this incentive program would allow us to evaluate any service quality deterioration under an incentive plan. Therefore, we tentatively conclude that all carriers that elect to be-

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[12] *LEC Price Caps Order*, at 6807.

[13] In some instances the closest LEC will not always be clear, *e.g.*, where there are more than one LEC with abutting service territories. Therefore, in those circumstances we propose to prohibit the price for the new service exceeding the highest price of any price cap LEC with an abutting service territory.

come subject to this incentive plan would be required to file the quarterly service quality information reports required of all price caps carriers. We also propose that these carriers file the information contained in the annual infrastructure reports filed by the LECs for which price caps are mandatory;[14] however, we propose that the incentive plan carriers would file such reports every two years, concurrent with their biannual tariff filings. We seek comment on the need for further measures to assure that service quality and infrastructure development are not adversely affected by our adoption of an incentive plan.

g. Eligibility and Optional Basis

22. This incentive plan would be available to any non-price cap LEC that also participates in no NECA pool. Our tentative decision to limit eligibility to depooled carriers is based on the same concerns we articulated in determining price cap eligibility for LECs. Pools are created to spread risks and earnings. The regulatory approach of this optional incentive plan appears inconsistent with pooling because in a pool, neither the balance of risk and benefit, nor the incentives for efficiency can be targeted to specific pool members. Thus we tentatively conclude that the incentive plan should not be available to companies that collectively offer a single interstate tariff with pooled rates or earnings.

23. Companies subject to rate of return regulation are diverse, ranging from very small to large companies. These companies also vary in terms of cost characteristics and demand growth or decline in their serving areas. Because of the varied circumstances of each company, the risks and rewards of incentive regulation plans for each will differ in ways that are difficult to predict. We tentatively conclude that any incentive plan designed for rate of return carriers should be optional.

24. To maximize the benefits of an incentive plan, the company's total regulated interstate operations should be subject to the plan. However, because many smaller companies lack the economies of scale of larger carriers, these companies may experience sufficient instability in their common line revenues to dissuade them from participating in the plan if such an all-or-nothing approach is employed. We nonetheless tentatively conclude that companies electing the incentive plan develop and maintain both common line and traffic sensitive rates within the incentive plan rules. Comment is also sought on this proposal; parties urging adoption of a bifurcated approach (*e.g.*, allowing participation for TS only) should provide data and information supporting their views.

25. Because under the incentive plan rates would be based on actual historical costs, it may be necessary to permit average schedule study areas of companies electing the incentive plan to remain in the NECA pools. Should such carriers wish to include their average schedule study areas in the incentive plan, we propose that the performance of cost studies be required. We seek comments on this proposal.

26. Under our price cap rules, an election to participate in price caps is irrevocable. While commitment to the plan for a period of time is necessary for incentive regulation to be effective, we do not conclude that this incentive plan, subject to biannual rate of return-based recalculation, must be irrevocable. Nevertheless, we believe that a degree of commitment by incentive plan companies should be required to assure that the incentives can work. We therefore propose that carriers electing participation in the incentive plan, must remain in the plan for no less than 2-years. If a carrier subsequently elects not to participate in the plan, it must file rates pursuant to Section 61.38 on a company-specific basis. The company would not be eligible to return to the incentive plan until the fourth year after the year in which it ceased its participation in incentive regulation.

B. Historical Cost Tariffs for Small Companies (Section 61.39)

1. Summary

27. Section 61.39 permits small telephone companies to file tariffs for their traffic sensitive rates every two years in lieu of participating in the NECA traffic sensitive pool. The rates are developed from the company's actual historical costs, or historical average schedule settlements. Thus, Section 61.39 incorporates reliance on historical costs and longer tariff periods. Eligibility is limited to LECs serving 50,000 or fewer access lines, realizing total annual revenues of $40 million or less. In 1991, 39 small companies filed on a non-pooled basis traffic sensitive rates under Section 61.39. This section of this Notice proposes to expand these rules to provide for similar regulatory treatment of common line rates.

2. Discussion

28. On April 11, 1989, the Unites States Telephone Association (USTA) filed a petition for rulemaking seeking reduced regulatory burdens for depooled small local exchange carriers by allowing them to extend their historical-cost based filing approach to their carrier common line (CCL) charge and subscriber line charge (SLC) tariff filings. Specifically, the petition requested the Commission to conduct a rulemaking to allow small companies, both cost and average schedule, the option to leave the NECA CCL pool and be subject instead to the following provisions: (1) CCL and SLC tariff filings would be based on the most recent historical costs and demand, or the most recent average schedule settlement formula; (2) CCL and SLC rates would be considered presumptively reasonable; (3) common line tariffs would be filed every other year; (4) carriers would be exempt from the supporting information requirements of Section 61.38; (5) Part 65 refund requirements would not be applicable; (6) the carriers would reference NECA's Tariff F.C.C. No. 5, regarding terms and conditions, but use their own costs or average schedule settlements for rate derivation; (7) small and large carriers would be required to comply with the Commission's rules regarding long-term and transitional support as if there were no withdrawals from the pool; and (8) average schedule carriers would calculate their CCL rates based on the revenue requirements of NECA's most recent average schedule formula, subtracting their own anticipated SLC revenues as set by the Commission for carriers participating in the NECA SLC tariff. The petition does not define "small carriers" but appears to assume that the Section 61.39 eligibility criteria would apply. Under

[14] *LEC Price Caps Order*, at 6827-6835.

the current rules, the carriers would only have to submit cost data if the Commission specifically requests it. The only two parties commenting on USTA's petition were NECA and the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO). These parties strongly supported the USTA petition.

29. We have compared the rates generated under Section 61.39 for traffic sensitive tariffs to the rates filed by NECA and other carriers under Section 61.38. Generally, rates filed by Section 61.39 carriers have been consistently lower than the NECA rates. Increases were less than NECA increases; reductions were greater than NECA rate reductions. Based on these findings, we tentatively conclude that the traffic sensitive rates filed under Section 61.39 have reasonably reflected the intent and policies underlying this rule. In particular, the Commission's goal of rate neutrality has been met.[15] Since the implementation\of the small company rules, approximately forty LECs have used the provisions. We tentatively conclude that the small company rules have neither encouraged nor discouraged participation in NECA pools. Therefore, the Commission's goal of pooling neutrality has also been met. The petitioners believe that these rules have effectively reduced regulatory burdens, allowing smaller LECs to maintain company specific traffic sensitive rates. The experience of companies under Section 61.39 for traffic sensitive rates has been positive, and supports a decision to consider expansion of those rules to include common line rates.

30. As suggested above, the chief policy consideration cited in the *Small Company Rulemaking* in favor of the modified filing requirements for traffic sensitive rates was the reduction of administrative burdens on small LECs, who generally have limited resources to meet more detailed filing requirements.[16] This same general concern would apply to common line rate filings as well. Even though the NECA pools themselves impose low administrative burdens upon members and substantial benefits to the Commission, options of using historical costs, with a presumption of reasonableness, and of applying the same ratemaking methodologies for traffic sensitive and common line, respectively, could bring smaller LECs significant relief.

31. Such relief for the carriers may require the Commission to conduct additional monitoring to ensure the accuracy and reasonableness of historical costs. The Commission under existing small company rules presumed that interexchange carriers would monitor the small companies' rates, and therefore directed small companies to provide the necessary information to the interexchange carriers. The interexchange carriers, however, would have no direct interest in monitoring the reasonableness of SLC rates, and these rates are of special concern to the Commission.

32. Even if the administrative burden were equal for traffic sensitive and common line filings, the underlying cost structures of traffic sensitive and common line rates are so different that genuine rate neutrality may be impossible without some modification of USTA's proposal. Under rate of return principles, rate neutrality ought to include consideration of costs and net revenue, in addition to rate levels *per se*. For traffic sensitive elements, recent historical costs are closer to actual, near-term, future costs because there is an inherent continuity of cost levels over short time spans. For example, a change in demand is likely to cause a similar change in costs allocated by the separations process.[17]

33. For common line rates, however, the total costs are derived from a fixed 25 percent allocation of total common line costs to the interstate jurisdiction in separations and are recovered by CCL rates, SLC rates and the special access surcharge. CCL rates cover the remaining costs after SLC and special access surcharge revenues are subtracted. Calculation of proper rates for each of these elements, taking into account support payments, is likely to be more complicated than for traffic sensitive rates, even when historical cost and demand are used. In addition, the growth in demand for common line minutes relative to essentially fixed common line costs may create an intrinsic distortion which would continuously drive future unit costs below historical unit costs. This would give a windfall to the carrier, even in the absence of actual economies. On the other hand, this situation may arise only if demand growth is very strong, because SLC rates are capped and cost increases flow to the residual CCL rates. It is not clear whether growth would be equally strong in the future. It seems likely that applying the traffic sensitive approach to CCL and SLC may be too generous to some LECs and too harsh on others. Therefore, a methodology is needed that assures fairness to subscribers paying SLC rates and that factors individual company demand growth into the calculation of CCL rates.

34. We tentatively conclude that these concerns regarding the derivation of SLC and CCL rates under an expanded Section 61.39 can be adequately addressed. Companies electing to file common line rates under Section 61.39 would perform the calculations specified in Part 69 of the Commission's Rules using costs from the most recent 12-month period (or most recent common line settlements through the average schedules). To derive demand, the company would determine the average CCL usage and the percentage growth in usage over the most recent 24-month period. This method ensures revenue neutrality by factoring the company's historical demand growth into the rates. Demand for the rate period would be determined by a simple extrapolation of base period demand increased by base period percent growth. Companies filing common line rate under Section 61.39 would file their SLC calculations with the Commission at the time the tariffs are filed.[18] Common line demand growth

[15] In the *Small Company Order*, the Commission defined "rate neutrality" as ensuring that "their access rates are not unreasonably high." 2 FCC Rcd 1012 (1986).

[16] Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rulemaking, 2 FCC Rcd 1010(1986); Report and Order, 2 FCC Rcd 3811 (1987), *on recon.*, 3 FCC Rcd 5770 (1988) (*Small Company Rulemaking*).

[17] To the extent the carrier can actually reduce traffic sensitive costs from one biennial filing to the next, any lag would enable it to enjoy a limited, temporary increase in net revenue. In fact, this functions as a simplified incentive regulation plan, with a short term reward for increased productivity and efficiency, but without prospective adjustments for inflation, productivity, and exogenous costs, as required under price caps.

[18] We would propose that the support for calculations of CCL rates be treated the same as traffic sensitive rate cost support -- the supporting information would not need to be filed. However, the company should retain the information in case the

in the historical period would be applied to the historical costs for that period. Thus, the carrier has the incentive to increase demand during the tariff period. If demand is increased, the stockholders benefit from higher earnings. Ratepayers benefit through lower rates established for the next tariff period which would be based on lower rates resulting from the increased demand.

35. We tentatively conclude that the goals of simplification, reduction of regulatory burdens, and assurance of reasonable rates, can be achieved by permitting eligible carriers to elect Section 61.39 rules for either traffic sensitive or both traffic sensitive and common line rate development. If a carrier elects Section 61.39 for only traffic sensitive rates the carrier would remain in the NECA common line pool.

36. Other aspects of the current Section 61.39 rules would apply to this proposed common line expansion. The tariffs would continue to be filed every other year. Mid-course corrections would be permitted and evaluated on a case-by-case basis. To assist carriers electing this option, NECA would be required to file a simplified access tariff containing terms and conditions, and permit small companies that choose to file separate access rate schedules to reference the NECA tariff for terms and conditions.

37. Finally, in the *Small Company Rulemaking*[19] small companies filing under Section 61.39 were excluded from the automatic refund requirement. The Commission emphasized that these carriers remain subject to the rate of return prescription in effect at the time rates are in effect, and that if the actual return exceeded the authorized return, the Commission reserved the right, at its discretion, to enforce its rate of return prescription by appropriate action. This issue is being addressed in CC Docket No. 92-133. Interested parties should comment on this aspect of the small company rules in that proceeding.

C. Baseline Rate of Return Regulation Based on Prospective Costs (Section 61.38 and Part 69)

1. Current Rules

38. Current rules generally require carriers subject to rate of return regulation, including NECA, to file tariffs with the Commission every year.[20] Small companies, serving 50,000 access lines or fewer, that qualify as NECA subset 3 carriers (annual operating revenues of $40 million or less), may opt to file traffic sensitive rates every other year.[21]

39. Supporting information required with annual tariff filings includes: a cost of service study for the previous year; a study of projected costs for the tariff period; and estimates of the effect of proposed tariff changes on traffic and revenues.[22] The specific data formats for the supporting information are detailed in a Tariff Review Plan (TRP), which is released by the Common Carrier Bureau each year.[23] The level of cost, demand, and revenue data required by the TRP varies, with greater detail demanded of the larger carriers. The TRP divides companies into three groups -- Tier 1, Tier 2A, and Tier 2B -- for purposes of establishing different levels of support data.[24]

40. This NPRM refers to these requirements as the "baseline" requirements for rate of return carriers. This baseline of regulation is applicable to NECA and individual companies or groups of companies that choose not to participate in the NECA pools and choose not to elect either the small company rules (§ 61.39) for traffic sensitive rates or price caps regulation.

41. The rules and level of detail required in annual tariff filings are substantially the same as those that were applied to the entire LEC industry prior to the implementation of price caps. This level of detail was deemed necessary for the Commission to review adequately tariff proposals of the largest carriers, in an environment where all LECs were subject to the same form of regulation and all participated in the common line pool administered by NECA. As already noted, approximately 93 percent of the LEC industry is now subject to price caps regulation, and all pooling is optional.

2. Proposed Revisions

42. As stated above, current baseline requirements apply to NECA and individual companies that do not elect price caps or Section 61.39 for traffic sensitive rates. As proposed, the modified baseline requirements would apply to rate of return carriers that do not elect the optional incentive plan and to rates of small companies not governed by Section 61.39. We tentatively conclude that the level of detail required to support tariff filings under our current rate of return regulation is excessive. The Commission's statutory obligations may be met and administrative burdens reduced by reforming the existing baseline requirements. We seek comment on this conclusion, and on specific modifications to rate of return regulation proposed below.

43. We believe that the frequency of required tariff filings for the baseline may be a facet of our baseline requirements ripe for regulatory reform. It may be adequate to require baseline tariff filings every other year. This would not limit carriers from filing more frequently. Our experience with tariff filings under Section 61.39 shows that reducing the number of required tariff filings can lower administrative costs, and still ensure that carriers establish reasonable service rates.

44. The methodologies used to project costs and demand may also be simplified and still provide sufficient information to set just and reasonable rates. Specifically, projected costs and demand data may be developed as simple extrapolations of historical costs and demand. Alternatively, it may be possible to require only historical costs to support certain rate elements, such as traffic sensitive rates. Under this approach, carrier common line rates would be

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Commission subsequently needs it. In addition, the cost support would be made available to interexchange carrier customers upon reasonable request.

[19] *Small Company Rulemaking* at 3813.

[20] 47 C.F.R. §69.3

[21] 47 C.F.R. § 69.3(f).

[22] 47 C.F.R. § 61.38(b).

[23] *See, e.g.*, Commission Requirements for Cost Support Material To Be Filed with 1992 Annual Access Tariffs, 7 FCC Rcd 1477 (1992) (*TRP Order*).

[24] *Id.* at paras. 5-7.

based upon cost and demand growth in the historical period and exogenous changes as defined in the price caps rules.

45. We seek comment on whether more streamlined procedures for the introduction of new services for carriers using baseline rate of return regulation would serve the public interest. Many small companies serve areas adjacent to those of Bell Operating Companies or other large carriers. When a larger carrier offers a new service, competitive necessity may require the smaller carrier to offer the service too. New services and technologies are as important to small towns and rural areas as they are to cities. Thus, we propose to apply streamlined procedures, -- 14days' notice periods and a presumption of lawfulness -- to new service offerings of rate of return regulated carriers when the service's anticipated revenues are less than 2 percent of the company's total annual operating revenue. A second requirement for streamlined treatment would be that the rate levels for such services be no higher than those of a neighboring LEC offering of the same service.[25] We also seek any other proposals concerning regulatory treatment of new services that are consistent with the goals stated in this Notice.

D. Incentive Regulation and Regulatory Reform within NECA

46. NECA performs a necessary role in the fulfillment of the mandates of the Communications Act. NECA administers programs that support the goals of universal service, provides carriers a means of risk sharing, and performs administrative functions for its members that lessen their regulatory and administrative burdens. For these reasons, alternative regulatory approaches should remain optional for NECA pooling participants. While NECA and the majority of its participants endorse this view, some of these carriers, particularly those experiencing competitive pressures to reduce rates, express interest in incentives for increased efficiency for pooled services.

47. Implementing incentive regulation for NECA participants presents a series of difficult issues however. The *LEC Price Caps Order* concluded that "participation in pools, by its nature, entails risk-sharing, and thus a weakening of incentives to operate efficiently."[26] For this reason NECA participants and, in effect NECA itself, were excluded from price caps regulation.[27] These findings assume that efficiency incentives and pooling are incompatible. We now seek to determine whether this is correct, or whether there are means of introducing incentive regulation into the pooling environment. A possible means would be to permit a NECA participant to commit to its historical settlement amount, for a period of years. For example, an individual company would be permitted to contract with the pool to accept as its full annual settlement an amount represented by an average of its annual pool settlements over the preceding three years. Comment on this and other means of providing incentive options within the NECA pools is sought. Additionally, NECA is encouraged to develop alternative incentives to encourage more efficiency in the pooling environment.

48. The Commission recognizes the difficulties involved in developing incentive options for pooled services. Because competitive pressures to establish such mechanisms will likely increase with time, we do not wish to preclude their development once this proceeding is concluded. In addition, current rules may present obstacles to the implementation of such options. Therefore suggestions are sought for rule revisions that will enable the implementation of incentive options within the pool at some future time.

E. Mergers and Acquisitions Under the Incentive Plan

49. In CC Docket 89-2, the Commission adopted a rule permitting LECs involved in mergers and acquisitions to retain their pre-transaction pooling status.[28] The rule's objective was to keep pooling rules neutral with regard to mergers and acquisitions. However, in the *LEC Price Caps Order*, the Commission found that a price cap carrier that acquires a nonprice cap carrier (other than an average schedule company) would be required to convert that carrier to price cap regulation within one year after the effective date of the transaction.[29] The Commission reasoned that the incentives and limitations facing a company that has both price cap and non-price cap affiliates would be very different from those facing a company that has both pooled and non-pooled affiliates.[30]

50. The issue now is whether an incentive plan carrier that subsequently acquires a non-incentive plan carrier should be required to convert the latter to the incentive plan. With one exception, the rationale of the *LEC Price Caps Order*, which would require conversion because of the negative incentives and limitations resulting from not imposing such a requirement, appears even more persuasive in this case than it was even under the price cap model. The exception would arise when a small, baseline regulated carrier acquires a few exchanges of a mid-size incentive regulated carrier. The acquiring carrier or the company resulting from the merger would be required to petition the Commission to merge affected study areas. Comment is sought on how the proposed rules will affect companies involved in mergers and acquisitions.

IV. COMMENTS; PROCEDURAL RULES

51. This notice of proposed rulemaking is being issued pursuant to the *LEC Price Caps Order* and to determine whether proposals presented here to modify the regulations governing LECs subject to rate of return regulation would be in the public interest. In this notice and comment rulemaking we expect to develop all the relevant, material and probative data and information needed to make that public interest determination. We also seek comment on any other proposals which could produce incentives for non-price cap LECs to be more efficient.

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[25] See note 13, *supra*.

[26] *LEC Price Caps Order*, at para 266.

[27] *Id.*; the Order, however, did permit NECA participants to exit the pools, become subject to Section 61.38 cost supported, company-specific tariffs, and elect price caps in a subsequent year.

[28] Amendment of Part 69 of the Commission's Rules Relating to the Common Line Pool Status of Local Exchange Carriers involved in Mergers or Acquisitions, CC Docket No. 89-2, 5 FCC Rcd 231 (1989).

[29] *LEC Price Caps Order*, at para. 282.

[30] *Id.*, at para. 284.

52. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time of issuance of a notice of proposed rulemaking until the time a draft Order proposing a substantive disposition of the proceeding is placed on the Commission's Open Meeting Agenda. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments or pleadings and oral arguments) between a person outside this Commission and a Commissioner or a member of this Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on this Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any written comments previously filed in the proceeding must prepare a written summary of that presentation. On the day of the oral presentation, that written summary must be served on this Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules. 47 C.F.R. § 1.1231.

53. Pursuant to applicable procedures set forth in Section. 1.415 and 1.419 of the Commissions Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments in this proceeding on or before **August 28, 1992** and reply comments on or before **September 28, 1992.** All relevant and timely comments will be considered by this Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

54. To file formally in this proceeding, participants must file and original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments an original and 11 copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Commission's Public Reference Room (Room 239) at is headquarters at 1919 M St., N.W., Washington, D.C.

55. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

56. We have determined that Section 605(b) of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605(b) does not apply to this rulemaking proceeding because if promulgated, it would not have a significant economic impact on a substantial number of small entities. The definition of a "small entity" in Section 3 of the Small Business Act excludes any business that is dominant in its field of operation. Although some of the local exchange carriers that will be affected are very small, local exchange companies do not qualify as small entities because they have a nationwide monopoly on ubiquitous access to the subscribers in their service area. The Commission has found all exchange carriers to be dominant in the *Competitive Carrier* proceeding. 85 FCC 2d 1, 23-24 (1980). To the extent that small telephone companies will be affected by these rules, we hereby certify that these rules will not have a significant economic effect on a substantial number of "small entities." Although we do not find that the Regulatory Flexibility Act is applicable to this proceeding, this Commission has an ongoing concern with the effect of its rules and regulation on small business and the customers of the regulated carriers as is evidenced by this proceeding. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

V. ORDERING CLAUSES

57. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 201-205, 303(r), and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 303(r), 403, NOTICE IS HEREBY GIVEN of proposed amendments to Part 61, and Part 69, and Sections 61.38, 61.39, 61.50, 61.58, and 69.3, in accordance with the proposals, discussions, and statement of issues in this Notice of Proposed Rulemaking, and as set forth in Appendix A to this Order, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

58. Accordingly, IT IS ORDERED, that a rulemaking proceeding IS INSTITUTED to determine whether proposals made herein concerning regulatory reform for LECs which remain subject to rate of return regulation would be in the public interest.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

Title 47 of the CFR, Parts 61, 65, and 69 are amended as follows:

PART 61 -- TARIFFS

1. The authority citation for Part 61 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

2. Section 61.3 is amended by revising paragraph (e) to read as follows:

§ 61.3 Definitions.

* * * * *

(e) *Base period.* The 12-month period ending six months prior to the effective date of annual price cap tariffs, or the 24-month period ending six months prior to the effective date of biennial optional incentive plan tariffs.

* * * * *

3. Section 61.38 is amended by revising paragraph (a) to read as follows

§ 61.38 Supporting Information to be submitted with letters of transmittal.

(a) *Scope.* This Section applies to dominant carriers whose gross annual revenue exceed $500,000 for the most recent 12 month period of operations or are estimated to exceed $500,000 for a representative 12 month period. Local exchange carriers serving 50,000 or fewer access lines in a given study area that are described as subset 3 carriers in § 69.602 of this chapter may submit Access Tariff filings for that study area pursuant to either this section or § 61.39. However, the Commission may require any carrier to submit such information as may be necessary for a review of a tariff filing. This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings proposing rates for services identified in §§ 61.42 (a), (b), (d), (e), and (g), promotional offerings that relate to services subject to price cap regulation, tariff filings proposing rates for services identified in §61.50, or to tariff filings, other than promotional filings, filed on 14 days notice pursuant to § 61.58(c)(6).

* * * * *

4. Section 61.39 is amended by revising paragraphs (a) and (b) to read as follows:

§ 61.39 Optional supporting information to be submitted with letters of transmittal for Access Tariff filings effective on or after April 1, 1989, by local exchange carriers serving 50,000 or fewer access lines in a given study area that are described as subset 3 carriers in Sec. 69.602.

(a) *Scope.* This Section provides for an optional method of filing for any local exchange carrier that is described as subset 3 carrier in § 69.602, which elects to issue its own Access Tariff for a period commencing on or after April 1, 1989, and which serves 50,000 or fewer access lines in a study area as determined under § 36.611(a)(8) of the Commission's Rules. However, the Commission may require any carrier to submit such information as may be necessary for review of a tariff filing. This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings proposing rates for services identified in § 61.42(d), (e), and (g), which filings are submitted by carriers subject to price cap regulation, or to tariff filings proposing rates for services identified in § 61.50, which filings are submitted by carriers subject to optional incentive regulation.

(b) *Explanation and data supporting tariff changes.* The material to be submitted for either a tariff change of a new tariff which affects rates or charges must include an explanation of the filing in the transmittal as required by § 61.33. The basis for ratemaking must comply with the following requirements. Except as provided in paragraph (b)(5) of this section, it is not necessary to submit this supporting data at the time of filing. However, the local exchange carrier should be prepared to submit the data promptly upon reasonable request by the Commission or interested parties.

(1) For a tariff change, the local exchange carrier which is a cost schedule carrier must propose Traffic Sensitive rates based on the following:

(i) For the first period, a cost of service study for Traffic Sensitive elements for the most recent 12 month period with related demand for the same period.

(ii) For subsequent filings, a cost of service study for Traffic Sensitive elements for the total period since the local exchange carrier's last annual filing, with related demand for the same period.

(2) For a tariff change, the local exchange company which is an average schedule carrier must propose Traffic Sensitive rates based on the following:

(i) For the first period, the local exchange carrier's most recent annual Traffic Sensitive settlement from the National Exchange Carrier Association pool.

(ii) For subsequent filings, an amount calculated to reflect the Traffic Sensitive average schedule pool settlement the carrier would have received if the carrier had continued to participate, based upon the most recent average schedule formulas developed by the National Exchange Carrier Association.

(3) For a tariff change, the local exchange carrier which is a cost schedule carrier must propose Common Line rates based on the following:

(i) For the first period, a cost of service study with demand for all Common Line elements for the most recent 12 month period with demand adjusted to reflect the growth in demand for the same period.

(ii) For subsequent filings, a cost of service study with demand for all Common Line elements for the total period since the local exchange carrier's last annual filing with demand adjusted to reflect the growth in demand for the same period.

(4) For a tariff change, the local exchange carrier which is an average schedule carrier must propose rates based on the following:

(i) For the first period, the local exchange carriers most recent annual Common Line settlement from the National Exchange Carrier Association and actual demand for the most recent 12 month period with demand adjusted to reflect the growth in demand for the same period.

(ii) For subsequent filings, an amount calculated to reflect the average schedule pools settlement the carrier would have received if the carrier had continued to participate, based upon the most recent average

schedule Common Line formulas developed by the National Exchange Carrier Association and actual demand for the same period with demand adjusted to reflect the growth in demand for the same period.

(5) For End User Common Line charges included in a tariff pursuant to this Section, the local exchange carrier must provide supporting information for the two-year historical period with its letter of transmittal in accordance with § 61.38.

* * * * *

5. Section 61.50 is added to read as follows:

§ 61.50 Optional incentive regulation for rate of return local exchange carriers.

(a) This section shall apply on an elective basis, to local exchange carriers that are neither participants in any Association tariff, nor affiliated with any such participants, except that affiliation with average schedule companies shall not bar a carrier from electing optional incentive regulation provided the carrier is otherwise eligible.

(b) If a telephone company, or any one of a group of affiliated telephone companies, files an optional incentive regulation tariff in one study area, that telephone company and its affiliates, except its average schedule affiliates, must file incentive plan tariffs in all their study areas.

(c) The following rules apply to telephone companies subject to this section, which are involved in mergers, acquisitions, or similar transactions, except that mergers with, acquisitions by, or other similar transactions with companies subject to price cap regulation, as that term is defined in § 61.3(W), shall be governed by § 61.41(c).

(1) Any telephone company subject to this section that is a party to a merger, acquisition, or similar transaction, shall continue to be subject to incentive regulation notwithstanding such transaction.

(2) Where a telephone company subject to this section acquires, is acquired by, merged with, or otherwise becomes affiliated with a telephone company that is not subject to this section, the latter telephone company shall become subject to optional incentive plan regulation no later than one year following the effective date of such merger, acquisition, or similar transaction and shall accordingly file optional incentive plan tariffs to be effective no later than that date in accordance with the applicable provisions of this Part 61.

(3) Notwithstanding the provisions of paragraph (c) (2) of this section, when a telephone company subject to optional incentive plan regulation acquires, is acquired by, mergers with, or otherwise becomes affiliated with a telephone company that qualifies as an "average schedule" company, the latter company may retain its "average schedule" status or become subject to optional incentive plan regulations in accordance with § 69.3(i)(3) of this chapter and the requirements references in that section.

(d) Local exchange carriers that are subject to this section shall not be eligible to withdraw from such regulation until the end of a two-year tariff period. If a local exchange carrier withdraws from optional incentive plan regulation, it must file company-specific tariffs under the provisions of § 61.38 for four years before becoming eligible to enter incentive plan regulation; such carrier may not participate in any Association tariff during that four years.

(e) Each local exchange carrier subject to this section shall establish baskets of services as identified in § 61.42 (d), (e) and (f).

(f) Each local exchange carrier subject to optional incentive regulation shall exclude from its baskets such services or portions of such services as the Commission has designated or may hereafter designate by order.

(g) New services, other than those within the scope of paragraph (f) of this section, must be included in the affected basket 12 months after their introduction. To the extent that such new services are permitted or required to be included in new or existing service categories within the assigned basket, they shall be so included 12 months after their introduction.

(h)

(1) Except as provided in paragraph (c)(4) of this section, in connection with any optional incentive plan tariff filings proposing rate changes, the carrier must calculate an API for each affected basket as proscribed in § 61.46 (a), (b) and (c).

(2) In connection with any tariff filed under this section proposing changes to rates for services in the basket designated in paragraph (e)(1) of this section, the maximum allowable carrier common line (CCL) charges shall be limited to a ten percent increase over the two-year tariff period, where the sum of each of the proposed Carrier Common Line rates multiplied by its corresponding historical period Carrier Common Line minutes of use is divided by the sum of all types of base period Carrier Common Line minutes of user.

(i) New services introduced pursuant to this section are deemed presumptively lawful, if the projected revenues for the new service are less than two percent of the carrier's total access revenues during the first 12 months of the offering, and the proposed rates, in the aggregate, are no greater than the rate for the same or comparable service offered by a price cap regulated local exchange carrier pro-

viding service in an adjacent serving area. Tariff filings made pursuant to this paragraph must include the following:

(1) A study containing a projection of costs for a representative 12 month period;

(2) Data to establish that the annualized projected service revenues during the first 12 month period of the service offering will be less than two percent of the carrier's total interstate access revenues during the most recent 12 month period; and

(3) Data to establish that, in aggregate, the proposed rates for the new service are no greater than those in effect for the same or comparable service offered by a geographically adjacent price cap regulated local exchange carrier.

6. Section 61.58 is amended by adding new paragraph (e) to read as follows:

§ 61.58 Notice requirements.

* * * * *

(e) *Carriers subject to optional incentive regulation.* This paragraph applies only to carriers subject to Section 61.50 of this Part. Such carriers must file tariffs according to the following notice periods:

(1) For initial and renewal tariff filings whose effective date coincides with the start of any two-year tariff period as defined in § 69.3(f) of this chapter, filings must be made on not less than 90 days' notice.

(2) For rate revisions made pursuant to § 61.50(j) and (k), tariff filings must be made on not less than 14 days' notice.

PART 69 -- ACCESS CHARGES

1. The Authority citation for Part 69 continues to read as follows:

AUTHORITY: Secs. 4, 201, 203, 205, 218, 403, 48 Stat, 1066, 1070, 1072, 1077, 1094, as amended 47 U.S.C. §§ 154, 201, 202, 203, 205, 218, 403, unless otherwise noted.

2. Section 69.3 is amended by revising the first sentence of paragraph (a), revising the first sentence of paragraph (e), and paragraph (i) introductory text, paragraph (i)(1), and paragraph (i)(3) to read as follows:

§ 69.3 Filing of access service tariffs.

(a) Except as provided in paragraph (h) of this section, a tariff for access service shall be filed with this Commission for a two-year period. ***

* * * * *

(e) A telephone company or group of telephone companies may file a tariff that is not an association tariff, except that a group rate for non-affiliated telephone companies may not be file tariff under Section 61.50; *e.g.*, the Association. ***

* * * * *

(i) The following rules apply to the withdrawal from Association tariffs under the provision of paragraphs (e)(6) or (e)(9) of this section or both by telephone companies electing to file price cap tariffs pursuant to § 69.3(h) or optional incentive plan tariffs pursuant to § 61.50 of this chapter.

(1) In addition to the withdrawal provisions of § 69.3(e)(6) and (9), a telephone company or group of affiliated telephone companies that participates in one or more Association tariffs during the current tariff year and that elects to file price cap tariffs or optional incentive regulation tariffs effective July 1 of the following tariff year, shall notify the Association with at least 6 months' notice that it is withdrawing from all Association tariffs, subject to the terms of this Rule, to participate in price cap regulation or optional incentive regulation.

* * * * *

(3) Notwithstanding the provisions of § 69.3(e)(3), (6), and (9), in the event a telephone company withdraws from all Association tariffs for the purpose of filing price cap tariffs or optional incentive plan tariffs, such company shall exclude from such withdrawal all "average schedule" affiliates and all affiliates so excluded shall be specified in the withdrawal. However, such company may include one or more "average schedule" affiliates in price cap regulation or optional incentive plan regulation provided that each price cap or optional incentive plan affiliate relinquishes "average schedule" status and withdraws from all Association tariffs and any tariff filed pursuant to 61.39(b)(2) of this chapter. *See generally* §§ 69.605(c), 61.39(b) of this chapter; MTS and WATS Market Structure: Average Schedule Companies, Report and Order, 103 FCC 2D 1026-1027 (1986).

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of

Provision of Access for
800 Service

ORDER

Adopted: July 28, 1992; Released: July 28, 1992

By the Chief, Common Carrier Bureau:

I. Introduction

1. On February 28, 1992, BellSouth Telecommunications, Inc. (BellSouth) filed a petition for waiver of the access time standards for 800 data base access established in the Memorandum Opinion and Order on Reconsideration in this docket.[1] We now grant BellSouth's requested waiver of the March 1993 access time standard but deny, without prejudice, its requested waiver of the March 1995 standard.

II. BACKGROUND

2. The Reconsideration Order established revised access time standards for the implementation of the 800 data base system. Under the revised standards, each LEC may replace the current NXX access system with mandatory data base access when that LEC can reduce access times for 97% of its originating 800 data base access traffic to five seconds or less, provided that, within two years thereafter, (a) none of its data base 800 traffic experiences an access time of greater than five seconds, and (b) the mean access time for all of its 800 data base traffic is 2.5 seconds or less. The Commission required the Bell Operating Companies (BOCs) and GTE to meet the first tier requirement (the 5-second/97% standard) by March 1993.[2]

3. The revised standards reflected a careful balancing of the benefits of the data base system, most notably, 800 number portability, with the costs of increased access delays. They were also the product of undisputed industry data about access times under both the current NXX system and the data base system. In particular, the Commission relied on an industry consensus at the time that: (1) access times under NXX access are 1.9 seconds, if the IXC interconnects at the end office, and 3.5 seconds, if the IXC interconnects at a tandem; (2) about 2/3 of current NXX traffic is delivered directly from the end office (so that the mean access time today is about 2.5 seconds); and (3) access times under a data base system would be 0.8 seconds, 1.0 seconds, 4.1 seconds, 4.8 seconds, or 8.1 seconds, depending upon the configuration of the originating LEC's network and the level of SS7 deployment in that network.[3]

III. BELLSOUTH'S WAIVER PETITION

4. BellSouth states that following the release of the Reconsideration Order, selected BOCs, as part of their implementation effort, initiated access time tests using different network configurations and switch types. It claims that these tests revealed that access times under a data base system will vary by switch type and that BellSouth will not be able to meet the Commission's five second standard simply by implementing SS7 interconnection at access tandems.[4] In light of these test results, BellSouth asks for a waiver of the 1993 and 1995 access time standards. The following chart sets forth the access times BellSouth proposes:[5]

	Percentage of Traffic Less Than:			
Date	**5 Seconds**	**5.5 Seconds**	**6 Seconds**	**6.5 Seconds**	**Mean**
3/93	93	97		99	
3/95	98				≤ 2.5

5. BellSouth states that because NXX access times are also in many cases longer than had been previously represented, its waivers would not generally result in access time increases in excess of the 3.1 second maximum contemplated by the Commission when it adopted a 5-second access time standard. Thus, whereas the five-second/97% standard contemplated three percent of a LEC's traffic

[1] *See* Provision of Access for 800 Service, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991) (*Reconsideration Order*). As defined in the Reconsideration Order, "access time" is the time that begins when the caller completes dialing an 800 call and ends when the call is delivered by the originating local exchange carrier (LEC) to an interexchange carrier (IXC). Callers experience additional delay as the IXC then completes the call through its network and the terminating LEC's network to the 800 subscriber. *Id.* at note 4.

[2] 6 FCC Rcd at 5425.

[3] *Id.* at 5422-23, 5425.

[4] BellSouth Petition at 3-4. *See also* Bellcore 800 Data base Access Time Study, attached as an Appendix to the BOC/GTE 800 Data Base Implementation Plan, filed March 2, 1992. This study also included findings that NXX access times are longer than previously represented, ranging from 1.5 seconds to 3.1 seconds for end office connections, and 3.3 to 5.8 seconds for access tandem connections.

[5] These access time projections represent BellSouth's capabilities -- not the actual access times that will occur. In other words, these data assume that IXCs use SS7 interconnection wherever BellSouth makes it available. If some IXCs do not elect to use SS7 interconnection, those IXCs' access times will be longer. These projections also assume, of course, that the 800 data base implementation process proceeds as planned, and in particular, that LEC/IXC SS7 interconnection testing and trunk conversions scheduled over the next six to eight months occur on schedule. Finally, these projections assume the installation of a software patch in certain Northern Telecom and AT&T switches that will reduce access times for those switches. The Northern Telecom patch is currrently available, while the AT&T patch is scheduled for availability in November or December 1992.

with access time increases of over three seconds, BellSouth states that 3.6% of its traffic will experience such increases.[6] BellSouth also states that almost two thirds of its traffic will experience access time decreases when 800 data base service is implemented in March 1993.[7]

6. It claims, further, that while it cannot meet the 5 second/97% standard in March 1993, it has substantially accelerated its network deployment plans in order to achieve the access time capabilities set forth in its waiver petition. These expedited efforts, it states, require a substantial amount of work and resources and careful planning and testing in order to avoid threats to network reliability.[8] To further accelerate its SS7 deployment so as to meet fully the 1993 access time standards, it states, would simply not be possible.[9]

7. BellSouth also asks us to waive the March 1995 requirement that all access times be 5 seconds or less. It states that between March 1993 and March 1995, it will implement SS7 interconnection capability in all its end offices, except those with 2B ESS equipment, which switches are not capable of performing SS7 interconnection. It claims that it currently has 61 2B ESS end offices and will replace fifteen of them by March 1995 and all of them by December 1997. To replace the last 46 such offices, it asserts, will cost $100-$110 million in capital expenditures and $20-$25 million in right to use expenses.[10] Since these offices originate only two percent of BellSouth's 800 traffic, BellSouth asks that it be given until 1997 to replace them.

IV. POSITIONS OF OTHER PARTIES

8. Commenting parties address BellSouth's waiver request in conjunction with similar waiver requests filed by other LECs. AT&T, CompTel, NDC, and ARINC generally opposed the LEC waivers. VISA also opposes the waivers, pending more detailed information on their impact on users. USTA, Centel, MCI, and Sprint support them, although MCI supports only a waiver of the 1993 access time standard, not the 1995 access time standard.[11] Other parties, such as Ad Hoc, ICA, and Cable & Wireless neither support nor oppose the waivers in their comments, pending further information.[12]

9. Parties opposing the waivers claim that the LECs do not adequately support their claims that waivers are necessary and warranted. For example, AT&T argues that LEC claims as to the cost of complying with the access time standards are not substantiated.[13] Similarly, CompTel and ARINC assert that LECs have not demonstrated that acceleration of their SS7 deployment plans would jeopardize network reliability.[14] They argue that waivers should not be granted unless LECs provide more detailed substantiation of LEC network reliability concerns, including quantification of the risks of outages or increased blockage. AT&T and ARINC claim, further, that the waivers would upset the careful balancing of interests incorporated into the access time standard and would degrade the quality of 800 access service.[15] In addition, several parties state that LECs did not provide sufficient information about the parameters of the tests underlying the new access time estimates. They argue that without this information, they cannot assess the accuracy or completeness of the revised data or its impact on IXCs or end users.[16] Finally, NDC argues that the waivers are really untimely petitions for reconsideration of the access time standard insofar as they assume the invalidity of that standard.[17]

10. Parties supporting the waivers claim that the small increase in access times that the waivers would permit is acceptable, at least for March 1993.[18] MCI urges that the Commission grant a blanket waiver that would permit LECs to implement mandatory data base access when 95% of its traffic experiences an access time of 6 seconds or less.[19] MCI opposes LEC requests for a waiver of the 1995 access time standards, claiming that it is premature to address these requests at this time, particularly since technological developments and changed network deployment plans may render these waivers unnecessary.[20]

11. Parties that neither support nor oppose the waivers express more concern about the reliability and firmness of the access time data underlying the LEC waiver requests than with the revised access time standards proposed in the petitions.[21] Most of these parties echo the concern voiced by other parties that the LECs did not provide sufficient information about how the access time tests were conducted, information that they claim is essential to an assessment of the reliability of these tests.[22] In addition, Ad Hoc notes that some LECs did not specifically commit to achieving the access times described in their waiver petitions, and it asks for such commitments. Several parties also decline to take a position pending the availability of various additional information about the extent to which nonconforming access times would exceed five seconds and the geographic distribution of traffic with higher access times.[23]

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[6] *See* letter from W.W. Jordan, Director-Federal Regulatory, BellSouth, to Donna Searcy, Secretary, FCC, July 6, 1992.

[7] *Id.*

[8] BellSouth Petition at 7.

[9] BellSouth Petition at note 7; BellSouth Reply at 3.

[10] BellSouth Petition at 6.

[11] Sprint initially opposed the waiver request of one LEC (US West) but withdrew its opposition in light of representations by that LEC in its Reply. *See* letter from Norina Moy, Manager, Federal Regulatory Affairs, US Sprint, to Donna Searcy, Secretary, FCC, May 22, 1992.

[12] ICA asks us to establish a second pleading cycle on the waiver petitions following receipt of the BOC/GTE Reply to comments on the BOC/GTE 800 Data Base Implementation Plan. ICA Comments at 7.

[13] AT&T Comments at 4.

[14] CompTel Comments at note 7; ARINC Comments at 9.

[15] AT&T Comments at 3-5; ARINC Comments at 1-5.

[16] *See* AT&T Comments at 5-6; CompTel Comments at 4-5; Allnet Comments at 1-2; ICA Comments at 5-6; NDC Reply at 3.

[17] NDC Reply at 6-7.

[18] *See* USTA Comments at 2-3; MCI Comments at 6; Sprint Comments at 13. *Cf.* Ad Hoc Comments at 6 ("A *slight* slippage of access time standards is not itself a terribly adverse matter.")

[19] MCI Comments at 6.

[20] In reply, some LECs indicate that they would not oppose a deferral of the 1995 waivers at this time. *See* NYNEX Reply at note 9; US West Reply at 16-17.

[21] *See, e.g.*, Ad Hoc Comments at 7-11.

[22] *See, e.g.*, Cable & Wireless Comments at Appendix 1; Ad Hoc Comments at 10-11.

[23] *See, e.g.*, ICA Comments at 7-11. *See also* NDC Comments at 9-12; VISA Comments at 3-7. ICA states that each LEC should be required to make available "exception lists" showing each end office where access delays in excess of 5.5 seconds may

V. DISCUSSION

12. We now grant BellSouth's requested waiver of the 1993 access time standards but deny, without prejudice, its request for a waiver of the 1995 access time standards. We believe that BellSouth has demonstrated good cause for a waiver of the 1993 access time standards, but that it is premature to consider any waivers of the 1995 standards.

13. Pursuant to Section 1.3 of the Commission's Rules, the Commission may waive any provision of its rules or orders on its own motion or on petition if good cause therefor is shown.[24] In supporting its case for a waiver, an applicant must demonstrate that there are special circumstances that warrant a deviation from the rule and must show how such deviation will serve the public interest.[25] We believe that BellSouth has met this burden with respect to the 1993 access time standard.

14. The record shows that in response to the Reconsideration Order, BellSouth has undertaken an ambitious SS7 deployment schedule. While BellSouth had previously planned to deploy SS7 interconnection and Service Switching Point (SSP) hardware and software throughout its network, BellSouth substantially accelerated these plans following the release of the Reconsideration Order. Indeed, it states it will advance SS7 interconnection in over twenty access tandems and 200-250 end offices. According to BellSouth, this effort will require SS7 interconnection conditioning of almost 300,000 trunks in excess of BellSouth's normal deployment schedules.[26] With this extensive effort, BellSouth will substantially meet the Commission's 1993 access time standard. Indeed, BellSouth seeks only a minor waiver of the 1993 standard -- an additional one half second for four percent of its traffic. Based on this evidence, we conclude that BellSouth's inability to meet the five second access time standard is not due to any deficiency or laxness in its SS7 deployment efforts.

15. On the contrary, BellSouth has accelerated its end office SS7 plans well beyond the levels contemplated by the Reconsideration Order and beyond its previous projected levels. For example, by March 1993, BellSouth will deploy SSPs in offices representing ninety percent of BellSouth's originating 800 traffic.[27] Moreover, while the Reconsideration Order contemplated that up to three percent of a LEC's traffic would experience access times of 8.1 seconds, only one percent of BellSouth's traffic will experience access times in excess of 6.5 seconds.[28] We agree with BellSouth that its current efforts are considerable and that there is not enough time to perform the additional work required to fully meet the 1993 access time standards without compromising network reliability goals.[29]

16. At the same time, since current NXX access times are longer than previously represented, the alternative access times proposed by BellSouth would not result in larger increases in access times than the five-second standard contemplated.[30] The Reconsideration Order permitted maximum increases of 3.1 seconds or less for 97% of each LEC's traffic; even with this waiver, BellSouth would substantially meet this standard, and BellSouth's small deviation from it is more than remedied by the substantial percentage of traffic that would experience access time decreases. Thus, a waiver is fully consistent with the Commission's intent to allow "at the outset of 800 data base access a temporary and limited increase in access times, while requiring shortly thereafter that access times are reduced to levels at least as good as they are today."[31] Based on these considerations, we find that BellSouth has demonstrated good cause for a waiver of the 1993 access time standard.[32]

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occur. In reply, MCI argues that as the implementation process unfolds and LECs' and IXCs' network configuration plans become more definite, carriers will provide the necessary access time information to end users. MCI states that the need for "exception lists," as recommended by ICA, is "not obvious." MCI Reply at 6.

[24] 47 C.F.R. § 1.3.

[25] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990).

[26] BellSouth Petition at 5-6.

[27] *See* letter from W.W. Jordan, Director-Federal Regulatory, BellSouth, to Donna R. Searcy, Secretary, FCC, May 20, 1992.

[28] Letter from W.W. Jordan, Director-Federal Regulatory, BellSouth, to Donna Searcy, Secretary, FCC, May 29, 1992.

[29] While some parties argue that LECs should be required to quantify the risks to network reliability before receiving waivers, such risks are inherently incapable of quantification. Virtually all parties agree that meeting the March 1993 deadline is in itself an ambitious undertaking. Parties also agree that considerable efforts must be made -- even with these waivers -- to ensure that all network changes are adequately tested and that the cutover to 800 data base access proceeds in an operationally sound and nondisruptive manner. *See, e.g.*, AT&T Comments at 6-7; NDC Reply at 4-5. Given the substantial amount of work that is already being perfomed under tight deadlines, we are satisfied that the additional network changes necessary to meet fully the 1993 five-second access time standard could not be accomplished without posing additional, undue risks to network reliability. That these incremental risks cannot be quantified in no way negates their significance.

[30] The five-second standard was not based on empirical data indicating that access times greater than five seconds are *per se* unacceptable. Rather, the standard was based on: (1) data indicating that data base system access times would be either 1 second or less, 4.1 seconds, 4.8 seconds, or 8.1 seconds; (2) a consensus among the parties that access times of 4.1 or 4.8 seconds could be achieved at far less cost than access times of 1 second; and (3) data showing current NXX access times to be either 1.9 or 3.5 seconds. All of these assumptions now turn out to be incorrect. The architectures that were thought to produce access times of 4.1 or 4.8 seconds sometimes result in access times of more than five seconds. Meeting the five second standard would thus be far more burdensome than previously thought.

[31] 6 FCC Rcd at 5425.

[32] We note, also, that BellSouth has made available to the industry detailed information about its switch configurations and SS7 deployment plans, so that BellSouth's access time capabilities can be determined on an end office-by-end office basis. Under the circumstances, the "exception list" sought by ICA is not necessary. To the extent users seek information about what access times will actually be under a data base system, this can be determined only when IXCs make available their network interconnection plans. We decline to defer consideration of BellSouth's waiver petition until all IXCs providing 800 service in BellSouth territory offer this information. We also note that the LECs have responded to questions raised in the record about the methodology and assumptions used in the new access time tests, and we are satisfied that the access time data provided are reasonably reliable. *See* BOC/GTE Response

17. The Commission has time and again emphasized the importance of 800 number portability to consumers and to a fully competitive 800 services marketplace. Thus, for example, in the Reconsideration Order the Commission stated:

> Commenters representing a broad cross-section of interests have stressed, both in this proceeding and in our proceeding examining competition in the interstate interexchange marketplace, the importance of 800 number portability. We concur. The records in these proceedings demonstrate that number portability will not only increase competition in the 800 services marketplace, but provide customers with more flexibility and more options in designing their 800 service.[33]

The waiver that we now grant will help ensure that the public receives these significant benefits as quickly as possible. At the same time, given the limited scope of this waiver, we are confident that it will have only a minor impact on 800 access times.

18. In granting BellSouth its requested waiver of the 1993 access time standards, we emphasize that we require BellSouth to have the access time capabilities set forth in its waiver petition and *ex parte* presentations. This means that by March 1993, BellSouth must be able to achieve access times of five seconds or less for 9 of its traffic, and 5.5 seconds or less for 97% of its traffic.[34] In addition, BellSouth must have SSPs in offices representing ninety percent of 800 minutes of use.[35] In addition, BellSouth must fulfill its commitment to deploy, upon availability, the AT&T and Northern Telecom software patches so as to reduce access times for the affected switches to the maximum extent possible.[36]

19. We deny, without prejudice, BellSouth's request for a waiver of the 1995 standard. While BellSouth might be able to demonstrate in the future that good cause exists for a waiver of the 1995 requirements, it is premature to consider such a waiver request at this time. We note that LEC SS7 deployment plans have changed substantially over the course of the last few years, and it is likely that further changes will occur. Moreover, technological developments, including switching software upgrades that are not currently available, may render BellSouth's 1995 waiver request unnecessary. For example, Southwestern Bell notes in its waiver petition that it is working with switch vendors to explore the feasibility of software patches for DMS-10 and 2B ESS switches.[37] If such patches become available, BellSouth may be able to meet fully the 1995 access time standard without replacing these switches. Therefore, BellSouth has not demonstrated good cause at this time for a waiver of the 1995 access time standards.

VI. ORDERING CLAUSE

20. Accordingly, pursuant to the authority contained in Sections 0.91(a) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 (a) and 0.291, IT IS ORDERED that the petition for waiver filed February 28, 1992 by BellSouth IS HEREBY GRANTED IN PART AND DENIED IN PART as described in this order.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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to Comments on Implementation Plan for 800 Data Base Access Service, Appendix C. Finally, we reject NDC's argument that the LEC waiver petitions must be viewed as untimely petitions for reconsideration. Each of these petitions, including the BellSouth petition at hand, demonstrates good cause for a limited waiver of the 1993 access time standards. Moreover, waivers are an appropriate procedural vehicle insofar as the circumstances necessitating each waiver and the scope of relief requested in each petition vary from LEC to LEC.

[33] 6 FCC Rcd at 5426 (footnote omitted).

[34] *See* BellSouth Petition at 2.

[35] *See* letter to Donna Searcy, Secretary, FCC, from W.W. Jordan, Director - Federal Regulatory, BellSouth, May 20, 1992.

[36] *See* note 5, *supra*.

[37] *See* Southwestern Bell Petition for Waiver, filed March 27, 1992, at 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of

Provision of Access for
800 Service

ORDER

Adopted: July 28, 1992; Released: July 28, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 2, 1992, the GTE Service Corporation and its affiliated domestic telephone operating companies (GTE) filed a petition for waiver of the 1993 access time standards for 800 data base access, established in the Memorandum Opinion and Order on Reconsideration in this docket.[1] We now grant GTE's requested waiver.

II. BACKGROUND

2. The *Reconsideration Order* established revised access time standards for the implementation of the 800 data base system. Under the revised standards, each LEC may replace the current NXX access system with mandatory data base access when that LEC can reduce access times for 97% of its originating 800 data base access traffic to five seconds or less, provided that, within two years thereafter, (a) none of its data base 800 traffic experiences an access time of greater than five seconds, and (b) the mean access time for all of its 800 data base traffic is 2.5 seconds or less. The Commission required the Bell Operating Companies (BOCs) and GTE to meet the first tier requirement (the 5-second/97% standard) by March 1993.[2]

3. The revised standards reflected a careful balancing of the benefits of the data base system, most notably, 800 number portability, with the costs of increased access delays. They were also the product of undisputed industry data about access times under both the current NXX system and the data base system. In particular, the Commission relied on an industry consensus at the time that: (1) access times under NXX access are 1.9 seconds, if the IXC interconnects at the end office, and 3.5 seconds, if the IXC interconnects at a tandem; (2) about 2/3 of current NXX traffic is delivered directly from the end office (so that the mean access time today is about 2.5 seconds); and (3) access times under a data base system would be 0.8 seconds, 1.0 seconds, 4.1 seconds, 4.8 seconds, or 8.1 seconds, depending upon the configuration of the originating LEC's network and the level of SS7 deployment in that network.[3]

III. GTE'S WAIVER PETITION

4. GTE states that following the release of the *Reconsideration Order*, and as it began implementing its data base system, it began testing access times using different end office and access tandem switch types. It claims that these tests revealed that, both for NXX access and data base access, access times vary by switch type. For data base access, its tests showed that certain switches cannot achieve five second access times even with SS7 interconection at the tandem, thereby foreclosing the possibility of acheiving the 1993 access time standards. To overcome these limitations, and to make the switch corrections necessary to meet the 1993 standards, GTE states that it would need to launch a burdensome "crash program" to install new network components and software generic upgrades for both Service Control Points (SCPs) and central office switches. Even with this, it says, it still might not be feasible to meet the 1993 standards, since the actual performance of these switch upgrades is unknown at this time. GTE therefore asks for a waiver of the 1993 access time standards. The following chart sets forth the access times GTE proposes:[4]

	Percentage of Traffic Less Than:			
Date	**5 Seconds**	**5.5 Seconds**	**6 Seconds**	**6.5 Seconds**
3/93	90.4	97		

5. GTE states that while it cannot meet the 5 second/97% standard in March 1993 without jeopardizing network reliability, it will exceed FCC access time standards in other respects. For example, it states that its primary network configuration will result in access times of between 3.4 and 4.1 seconds, well below the Commission's five-second standard.[5] In addition, GTE states that because NXX access times are in many cases longer than had been previously represented, its waiver would not result in access time increases greater than those contemplated by the Commission's five-second/97% standard. GTE notes that whereas the five-second/97% standard assumes that up to three percent of each LEC's traffic will

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[1] *See* Provision of Access for 800 Service, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991) (*Reconsideration Order*). As defined in the Reconsideration Order, "access time" is the time that begins when the caller completes dialing an 800 call and ends when the call is delivered by the originating local exchange carrier (LEC) to an interexchange carrier (IXC). Callers experience additional delay as the IXC then completes the call through its network and the terminating LEC's network to the 800 subscriber. *Id.* at note 4.

[2] 6 FCC Rcd at 5425.

[3] 6 FCC Rcd at 5422-23, 5425.

[4] These access time projections represent GTE's capabilities -- not the actual access times that will occur. In other words, these data assume that IXCs use SS7 interconnection wherever GTE makes it available. If some IXCs do not elect to use SS7 interconnection, those IXCs' access times will be longer. These projections also assume, of course, that the 800 data base implementation process proceeds as planned, and in particular, that LEC/IXC SS7 interconnection testing and trunk conversions scheduled over the next six to eight months occur on schedule. Finally, these projections assume the installation of a software patch in certain Northern Telecom and AT&T switches that will reduce access times for those switches by up to one second or more. *See* GTE Reply at 6.

[5] GTE Petition at 3.

experience increases in access time of more than 3.1 second, only 1.9% of GTE's traffic will experience such increases.[6] GTE represents, further, that it expects to fully comply with the access time standard that the Commission established for March 1995.[7]

IV. POSITIONS OF OTHER PARTIES

6. Commenting parties address GTE's waiver request in conjunction with similar waiver requests filed by other LECs. AT&T, CompTel, NDC, and ARINC generally oppose the LEC waivers. VISA also opposes the waivers, pending more detailed information on their impact on users. USTA, Centel, Sprint, and MCI support the 1993 waiver requests.[8] Other parties, such as Ad Hoc, ICA, and Cable & Wireless neither support nor oppose the waivers in their comments, pending further information.[9]

7. Parties that oppose the waivers claim that the LECs do not adequately support their claims that waivers are necessary and warranted. For example, AT&T argues that LEC claims as to the cost of complying with the access time standards are not substantiated.[10] Similarly, CompTel and ARINC assert that LECs have not demonstrated that acceleration of their SS7 deployment plans would jeopardize network reliability.[11] They argue that waivers should not be granted unless LECs provide more detailed substantiation of LEC network reliability concerns, including quantification of the risks of outages or increased blockage. AT&T and ARINC claim, further, that the waivers would upset the careful balancing of interests incorporated into the access time standard and would degrade the quality of 800 access service.[12] In addition, several parties state that LECs did not provide sufficient information about the parameters of the tests underlying the new access time estimates. They argue that without this information, they cannot assess the accuracy or completeness of the revised data or its impact on IXCs or end users.[13] Finally, NDC argues that the waivers are really untimely petitions for reconsideration of the access time standard insofar as they assume the invalidity of that standard.[14]

8. Parties supporting the waivers claim that the small increase in access times that the waivers would permit is acceptable, at least for March 1993.[15] MCI urges that we grant a blanket waiver that would permit each LEC to implement mandatory data base access if 95% of its traffic experiences an access time of 6 seconds or less.[16]

9. Parties that neither support nor oppose the waivers express more concern about the reliability and firmness of the access time data in the LEC waivers than with the revised access time standards proposed in the waiver petitions.[17] Most of these parties echo other parties' concern that insufficient information (was provided about how the access time tests were conducted, information that they claim is essential to an assessment of the reliability of these tests.[18] In addition, Ad Hoc notes that some LECs did not specifically commit to achieving the access times set forth in their waiver petitions, and it asks for such commitments.[19] Several parties also decline to take a position pending the availability of various additional information about the extent to which nonconforming access times would exceed five seconds and the geographic distribution of traffic with higher access times.[20]

V. DISCUSSION

10. We now grant GTE's requested waiver of the 1993 access time standards. Pursuant to Section 1.3 of the Commission's Rules, the Commission may waive any provision of its rules or orders on its own motion or on petition if good cause therefor is shown.[21] In supporting its case for a waiver, an applicant must demonstrate that there are special circumstances that warrant a deviation from the rule and must show how such deviation will serve the public interest.[22] We believe that GTE has met this burden with respect to the 1993 access time standard.

11. The record shows that in response to the *Reconsideration Order*, GTE has undertaken an extensive SS7 deployment schedule and has proceeded to introduce and test hardware and software upgrades swiftly in order to reduce substantially access times under its data base system. As a result of this SS7 deployment program, GTE will substantially comply with the Commission's 1993 access time standard. Indeed, GTE only requests that it be permitted an additional half second in access time for 6.6% of its traffic. Moreover, GTE states that it is committed to in-

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[6] Letter from F. Gordon Maxson, Director-Regulatory Affairs, GTE, to Donna Searcy, Secretary, FCC, July 14, 1992.

[7] GTE Petition at ii.

[8] Sprint initially opposed one LEC waiver request (US West's), but withdrew its opposition in light of representations made in US West's Reply. *See* letter from Norina Moy, Manager, Federal Regulatory Affairs, US Sprint, to Donna Searcy, Secretary, FCC, May 22, 1992.

[9] ICA asks us to establish a second pleading cycle on the waiver petitions following receipt of the BOC/GTE Reply to comments on the BOC/GTE 800 Data Base Implementation Plan. ICA Comments at 7.

[10] AT&T Comments at 4.

[11] CompTel Comments at note 7; ARINC Comments at 9.

[12] AT&T Comments at 3-5; ARINC Comments at 1-5.

[13] *See* AT&T Comments at 5-6; CompTel Comments at 4-5; Allnet Comments at 1-2; ICA Comments at 5-6; NDC Reply at 3.

[14] NDC Reply at 6-7.

[15] *See* USTA Comments at 2-3; MCI Comments at 6; Sprint Comments at 13. *Cf.* Ad Hoc Comments at 6 ("A *slight* slippage of access time standards is not itself a terribly adverse matter.")

[16] MCI Comments at 6.

[17] *See, e.g.*, Ad Hoc Comments at 7-11.

[18] *See* Cable & Wireless Comments at Appendix 1; Ad Hoc Comments at 1011.

[19] Ad Hoc Comments at 9.

[20] *See e.g.*, ICA Comments at 7-11. *See also* NDC Comments at 9-12; VISA Comments at 3-7. ICA states that each LEC should be required to make available "exception lists" showing each end office where access delays in excess of 5.5 seconds may occur. In reply, MCI argues that as the implementation process unfolds and LECs' and IXCs' network reconfiguration plans become more definite, carriers will provide the necessary access time information to end users. MCI states that the need for "exception lists," as recommended by ICA, is "not obvious." MCI Reply at 6.

[21] 47 C.F.R. § 1.3.

[22] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990).

stalling and testing all necessary software and hardware to allow compliance with the Commission's 1995 access time standards.

12. At the same time, it appears that two switches (the DMS-10 and SCDCO), which account for 8.5% of GTE's traffic, cannot achieve access times of five seconds at this time. Moreover, no one disputes GTE's claim that even if software or hardware "fixes" to these switches can be developed, it is extremely unlikely that they could be developed, tested, and reliably implemented by March 1993. Under the circumstances, we think it is reasonable to grant GTE the limited waiver it seeks.[23]

13. We note, further, that since current NXX access times are longer than previously represented, the alternative access times proposed by GTE would not result in larger increases in access times than the five-second standard contemplated. The *Reconsideration Order* permitted maximum increases of 3.1 seconds or less for 97% of each LEC's traffic; even with this waiver, GTE would meet this standard. Thus, a waiver is fully consistent with the Commission's intent to allow "at the outset of 800 data base access a temporary and limited increase in access times, while requiring shortly thereafter that access times are reduced to levels at least as good as they are today."[24] We therefore find that GTE has demonstrated good cause for a waiver of the 1993 access time standard.[25]

14. The Commission has time and again emphasized the importance of 800 number portability to consumers and to a fully competitive 800 services marketplace. Thus, for example, in the Reconsideration Order the Commission stated:

> Commenters representing a broad cross-section of interests have stressed, both in this proceeding and in our proceeding examining competition in the interstate interexchange marketplace, the importance of 800 number portability. We concur. The records in these proceedings demonstrate that number portability will not only increase competition in the 800 services marketplace, but provide customers with more flexibility and more options in designing their 800 service.[26]

The waiver that we now grant will help ensure that the public receives these significant benefits as quickly as possible. At the same time, given the limited scope of this waiver, we are confident that it will have only a minor impact on 800 access times.

15. In granting GTE its requested waiver, we emphasize that we condition this waiver on GTE's commitment to achieve the access time capabilities described in its waiver petition and *ex parte* presentations to Commission staff. In addition, GTE must fulfill its commitment to deploy the AT&T and Northern Telecom software patches so as to reduce access times for the affected switches to the maximum extent possible.[27]

VI. ORDERING CLAUSE

16. Accordingly, pursuant to the authority contained in Sections 0.91(a) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 (a) and 0.291, IT IS ORDERED that the petition for waiver filed March 2, 1992 by GTE IS HEREBY GRANTED IN PART AND DENIED IN PART as described in this order.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[23] While some parties argue that LECs should be required to quantify the risks to network reliability before receiving waivers, such risks are inherently incapable of quantification. Virtually all parties agree that meeting the March 1993 deadline is in itself an ambitious undertaking. Parties also agree that considerable efforts must be made -- even with these waivers -- to ensure that all network changes are adequately tested and that the cutover to 800 data base access proceeds in an operationally sound and nondisruptive manner. *See, e.g.*, AT&T Comments at 6-7; NDC Reply at 4-5. Given the substantial amount of work that is already being perfomed under tight deadlines, we are satisfied that the additional switch upgrades or replacements necessary for GTE to meet fully the 1993 five-second access time standard could not be accomplished without posing additional, undue risks to network reliability. That these incremental risks cannot be quantified in no way negates their significance.

[24] 6 FCC Rcd at 5425.

[25] We note, as well, that GTE has made available to the industry detailed information about its switch configurations and SS7 deployment plans so that GTE's access time capabilities can be determined on an end office-byend office basis. Under the circumstances, the "exception list" sought by ICA is not necessary. To the extent users seek information about what access times actually will be under a data base system, this can be determined only when IXCs make available their network interconnection plans. We decline to defer consideration of GTE's waiver petition until all IXCs providing 800 service in GTE territory offer this information. We also note that the LECs, and GTE individually, have responded to questions raised in the record about the methodology and assumptions used in the new access time tests, and we are satisfied that the access time data provided are reasonably reliable. *See* GTE Reply at 3-7; BOC/GTE Response to Comments on Implementation Plan for 800 Data Base Access Service, Appendix C. Finally, we reject NDC's argument that the LEC waiver petitions must be viewed as untimely petitions for reconsideration. Each of these petitions, including the GTE petition at hand, demonstrates good cause for a limited waiver of the 1993 access time standard. Moreover, waivers are an appropriate procedural vehicle insofar as the circumstances necessitating each waiver and the scope of each waiver request differ.

[26] 6 FCC Rcd at 5426 (footnote omitted).

[27] *See* note 4, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of

Provision of Access for
800 Service

ORDER

Adopted: July 28, 1992; Released: July 28, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On January 21, 1992, Pacific Telesis (Pactel) filed a petition for waiver of the access time standards for 800 data base access, established in the Memorandum Opinion and Order on Reconsideration in this docket.[1] We now grant Pactel's requested waiver of the March 1993 access time standard, but deny, without prejudice, its requested waiver of the March 1995 standard.

II. BACKGROUND

2. The *Reconsideration Order* established revised access time standards for the implementation of the 800 data base system. Under the revised standards, each LEC may replace the current NXX access system with mandatory data base access when that LEC can reduce access times for 97% of its originating 800 data base access traffic to five seconds or less, provided that, within two years thereafter, (a) none of its data base 800 traffic experiences an access time of greater than five seconds, and (b) the mean access time for all of its 800 data base traffic is 2.5 seconds or less. The Commission required the Bell Operating Companies (BOCs) and GTE to meet the first tier requirement (the 5-second/97% standard) by March 1993.[2]

3. The revised standards reflected a careful balancing of the benefits of the data base system, most notably, 800 number portability, with the costs of increased access delays. They were also the product of undisputed industry data about access times under both the current NXX system and the data base system. In particular, the Commission relied on an industry consensus at the time that: (1) access times under NXX access are 1.9 seconds, if the IXC interconnects at the end office, and 3.5 seconds, if the IXC interconnects at a tandem; (2) about 2/3 of current NXX traffic is delivered directly from the end office (so that the mean access time today is about 2.5 seconds); and (3) access times under a data base system would be 0.8 seconds, 1.0 seconds, 4.1 seconds, 4.8 seconds, or 8.1 seconds, depending upon the configuration of the originating LEC's network and the level of SS7 deployment in that network.[3]

III. PACTEL'S WAIVER PETITION

4. Pactel states that following the release of the *Reconsideration Order*, and as it and other BOCs began implementing their data base systems, it began testing access times using different end office and access tandem switch types. It claims that these tests revealed that data base system access times will vary by switch type and that, generally, newer digital switches will result in longer access times than older switches, which had been used for earlier access time testing.[4] The tests showed, further, that Pactel would not be able to achieve access times of five seconds or less for certain switches, even with SS7 interconnection at the access tandem. In light of these test results, Pactel asks for a waiver of the 1993 and 1995 access time standards. The following chart sets forth the access times Pactel proposes in lieu of those required in the *Reconsideration Order*:[5]

	Percentage of Traffic Less Than:			
Date	**5 Seconds**	**5.5 Seconds**	**6 Seconds**	**6.5 Seconds**	**Mean**
3/93	82		98.7		2.5
3/95	97.9				< 1

5. Pactel asserts that it has diligently pursued its implementation plans for 800 number portability and that while it seeks a waiver of the 5 second/97% standard for March 1993, it will exceed FCC access time standards in other respects. For example, it states that by March 1993, it will meet the 2.5 second mean access time standard that

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[1] *See* Provision of Access for 800 Service, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991) (*Reconsideration Order*). As defined in the *Reconsideration Order*, "access time" is the time that begins when the caller completes dialing an 800 call and ends when the call is delivered by the originating local exchange carrier (LEC) to an interexchange carrier (IXC). Callers experience additional delay as the IXC then completes the call through its network and the terminating LEC's network to the 800 subscriber. *Id.* at note 4.

[2] 6 FCC Rcd at 5425.

[3] *Id.* at 5422-23, 5425.

[4] Pactel Petition at 7; Reply at Appendix A, Table 1.

[5] *See* Pactel Reply at 3. These access time projections represent Pactel's capabilities -- not the actual access times that will occur. In other words, these data assume that IXCs use SS7 interconnection wherever Pactel makes it available. If some IXCs do not elect to use SS7 interconnection, those IXCs' access times will be longer. These projections also assume, of course, that the 800 data base implementation process proceeds as planned, and in particular, that LEC/IXC SS7 interconnection testing and trunk conversions scheduled over the next six to eight months occur on schedule. Finally, these projections assume the installation of a software patch in certain Northern Telecom switches that will reduce access times for those switches. This patch is currently available. Unlike the projections of other carriers, Pactel's projections do not incorporate the impact of an AT&T software patch that should be available in November or December 1992 and that is projected to reduce access times on certain AT&T switches by one second or more.

the Commission established for March 1995. In addition, it states that its mean access time in 1995 will be less than 1 second.[6]

6. Pactel states that in order to meet the 1993 access time standard, it would be forced to accelerate substantially its SS7 deployment plans, at a cost of more than $115 million.[7] It claims, further, that aside from this cost, it would be nearly impossible to perform the additional work necessary to meeting the five-second/97% standard by March 1993.[8]

7. Pactel also seeks a waiver of the 1995 requirement that all access times be 5 seconds or less. Pactel states that while it will continue with an aggressive SS7 deployment program between March 1993 and March 1995, it is not feasible for it to reduce access times for all traffic to less than five seconds by 1995. Specifically, it asserts that in order to achieve this result, it would be forced to expend over $73 million upgrading or replacing switches that collectively serve only 2.3 percent of its traffic.[9] This, it says, makes no sense from an economic or network perspective.[10]

IV. POSITIONS OF OTHER PARTIES

8. AT&T, CompTel, and Allnet oppose Pactel's waiver request. SWBT, Ameritech, and Centel support it. Ad Hoc neither supports nor opposes the waivers, pending further information. MCI was likewise initially noncommital on the Pactel waiver request but subsequently endorsed a blanket waiver of the 1993 access time standards for all local exchange carriers, including Pactel.[11]

9. Parties that oppose the waivers claim that Pactel has not adequately supported its claim that waivers are necessary and warranted. For example, AT&T argues that Pactel does not substantiate its claim that it would cost $115 million to comply with the Commission's access time standards.[12] Allnet asserts a $115 million expenditure is not unreasonable since this amount represents only 1.5% of Pactel's total annual revenues during 1991.[13] CompTel and AT&T claim that the waiver would upset the careful balancing of interests incorporated into the access time standard and would degrade the quality of 800 access service.[14] In addition, AT&T asserts that Pactel does not provide sufficient information about the parameters of the tests underlying the new access time estimates. AT&T argues that without this information it cannot assess the accuracy or completeness of the revised data or its impact on customers.[15]

10. Parties supporting Pactel's waiver request claim that the small increase in access time that the waiver would permit is acceptable, at least for March 1993. Ameritech, assuming that Pactel could not meet the five-second/97% by March 1993, claims that adherence to the 1993 access time standard would thus only further delay the realization of the consumer benefits possible with 800 data base service.[16] In addition, noting that Pactel will meet or exceed the Commission's access time standards in several respects even with a waiver, Ameritech argues that the waiver would not have a significant adverse effect on access times.[17]

11. MCI urges us to grant a blanket waiver that would permit all LECs, including Pactel, to implement mandatory data base access when it can achieve access times of six seconds or less for 95% of its traffic.[18] MCI, however, opposes Pactel's request for a waiver of the 1995 access time standards, claiming that it is premature to address these requests at this time, particularly since technological developments and changed network deployment plans may render these waivers unnecessary.[19]

V. DISCUSSION

12. We now grant Pactel's requested waiver of the 1993 access time standards but deny without prejudice its request for a waiver of the 1995 access time standards. We believe that Pactel has demonstrated good cause for its requested waiver of the 1993 access time standards, but that it is premature to consider waiving the 1995 standards.

13. Pursuant to Section 1.3 of the Commission's Rules, the Commission may waive any provision of its rules or orders on its own motion or on petition if good cause therefor is shown.[20] In supporting its case for a waiver, an applicant must demonstrate that there are special circumstances that warrant a deviation from the rule and must show how such deviation will serve the public interest.[21] We believe that Pactel has met this burden with respect to the 1993 access time standard.

14. The record shows that in response to the *Reconsideration Order*, Pactel has planned an ambitious SS7 deployment schedule. Thus, by March 1993, it plans to deploy SS7 in most end offices in its largest LATAs and in all of

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[6] Pactel Petition at 11.
[7] Pactel Petition at 8.
[8] Pactel Petition at 8.
[9] Pactel Petition at 10.
[10] Pactel Petition at 10.
[11] MCI Comments in response to other LEC waivers, filed April 13, 1992, at 6. NDC filed comments that neither support nor oppose the Pactel waiver. Subsequently, NDC opposed several of the other LEC waiver requests. *See* NDC Comments in response to other LEC waivers, filed April 13, 1992, at 5 (opposing Ameritech, BellSouth, NYNEX, SWBT, and US West waivers). *See also* NDC Comments on Bell Atlantic's Waiver Petition, filed April 17, 1992. Since many of the arguments NDC offers against these other waiver requests could be applied to Pactel's waiver as well, we infer from this that NDC may now also oppose Pactel's waiver request.
[12] AT&T Comments at 5.
[13] Allnet Comments at 3.
[14] CompTel Comments at 7; AT&T Comments at 3-4.
[15] AT&T Comments at 4-5 and Appendix 1.
[16] Ameritech Comments at 2.
[17] *Id.*
[18] *See* MCI Comments in response to other LEC waiver petitions, April 13, 1992, at 3-6.
[19] Some LECs subsequently indicated that they did not oppose a deferral of the 1995 waivers at this time. *See* NYNEX and US West Replies, filed April 23, 1992 in response to comments on other LEC waiver petitions, at note 9 and at 16-17, respectively.
[20] 47 C.F.R. § 1.3.
[21] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990).

its access tandems.[22] This extensive effort will result in reduced access times for almost two thirds of its traffic and a mean access time in 1993 that meets the Commission's mean requirement for 1995. Moreover, by March 1995, Pactel will have deployed SS7 interconnection capability in virtually all of its end offices, and thus will be capable of achieving a mean access time of less than one second, which substantially exceeds FCC requirements and is substantially better than current NXX access time levels.

15. Despite these efforts, it does not appear that Pactel will be able to meet the March 1993 access time standard in a timely manner. Pactel states that in order to meet this standard, it would be required to implement SS7 to the end office level in all of its LATAs. This, it asserts, would not only require an expenditure of more than $115 million, but also a near impossible implementation schedule given the substantial amount of work required.[23] We agree that it would be difficult, if not impossible, for Pactel to accomplish these changes, along with all the other work that has to be performed by March 1993, without compromising network reliability.[24]

16. We note, further, that current NXX access times have also been found to be longer than previously represented.[25] Thus, the alternative access times proposed by Pactel would not result in significantly larger increases in access times than the five-second standard contemplated. The *Reconsideration Order* permitted maximum increases of 3.1 seconds or less for 97% of each LEC's traffic as of March 1993; even with this waiver, Pactel would substantially meet this standard.[26] Thus, a waiver is fully consistent with the Commission's intent to allow "at the outset of 800 data base access a temporary and limited increase in access times, while requiring shortly thereafter that access times are reduced to levels at least as good as they are today."[27] We therefore find that Pactel has demonstrated good cause for a waiver of the 1993 access time standard.[28]

17. The Commission has time and again emphasized the importance of 800 number portability to consumers and to a fully competitive 800 services marketplace. Thus, for example, in the Reconsideration Order the Commission stated:

> Commenters representing a broad cross-section of interests have stressed, both in this proceeding and in our proceeding examining competition in the interstate interexchange marketplace, the importance of 800 number portability. We concur. The records in these proceedings demonstrate that number portability will not only increase competition in the 800 services marketplace, but provide customers with more flexibility and more options in designing their 800 service.[29]

The waiver that we now grant will help ensure that the public receives these significant benefits as quickly as possible. At the same time, given the limited scope of this waiver, we are confident that it will have only a minor impact on 800 access times.

18. In granting Pactel its requested waiver, we emphasize that we condition this waiver on Pactel's commitment to achieve the access time capabilities described in its waiver petition and *ex parte* presentations to Commission staff. This means that Pactel must be capable of achieving a mean access time of 2.5 seconds by March 1993 and of less than one second by March 1995. In addition, Pactel must deploy, upon availability, the AT&T and Northern Telecom software patches so as to reduce access times for the affected switches to the maximum extent possible.[30]

19. We deny, without prejudice, Pactel's request for a waiver of the 1995 access time standard. While Pactel might be able to demonstrate in the future that good cause exists for a waiver of the 1995 requirements, it is premature to consider such a waiver request at this time. We note that LEC SS7 deployment plans have changed substantially over the course of the last few years, and it is likely that further changes will occur. Moreover, technological developments, including switching software upgrades that are not currently available, may render Pactel's 1995 waiver request unnecessary. For example, in Southwestern Bell's Waiver Petition, filed in this docket on March 27, 1992, Southwestern Bell notes that it is working with switch vendors to develop a patch for the DMS-10 and 2B ESS switches that might enable these switches to achieve five-second access times. Pactel, as well, uses a number of these switches and might be able to meet the 1995 access time standards at reasonable additional cost if

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[22] Pactel Petition at 8.

[23] Pactel Petition at 8.

[24] While some parties argue that LECs should be required to quantify the risks to network reliability before receiving waivers, such risks are inherently incapable of quantification. Virtually all parties agree that meeting the March 1993 deadline is in itself an ambitious undertaking. Parties also agree that considerable efforts must be made -- even with these waivers -- to ensure that all network changes are adequately tested and that the cutover to 800 data base access proceeds in an operationally sound and nondisruptive manner. *See, e.g.*, AT&T Comments at 6-7; NDC Reply at 4-5. Given the substantial amount of work that is already being perfomed under tight deadlines, we are satisfied that the additional network changes necessary to meet fully the 1993 five-second access time standard could not be accomplished without posing additional, undue risks to network reliability. That these incremental risks cannot be quantified in no way negates their significance.

[25] *See* Bellcore 800 Database Access Time Study, Special Report SR-NWT002251, Issue 1, February, 1992 at 21. This study was attached as an appendix to the BOC/GTE 800 Data Base Implementation Plan, filed March 2, 1992.

[26] *See* letter from William F. Adler, Executive Director, Federal Regulatory Relations, Pactel, to Donna Searcy, Secretary, FCC, July 24, 1992 (95% of Pactel traffic will experience increase of no more than 3.1 seconds; the remaining 5% would experience increases of between 3.2 and 3.5 seconds).

[27] 6 FCC Rcd at 5425.

[28] We note, also, that all of the LECs, including Pactel, have responded to many of the industry's questions about the methodology and assumptions used in the new access time tests. *See* BOC/GTE Response to Comments on Implementation Plan for 800 Data Base Access Service, Appendix C. In addition, they have made available to the industsry detailed information about their switch configurations and SS7 deployment plans so that their access time capabilities can be determined on an end office-by-end office basis.

[29] 6 FCC Rcd at 5426 (footnote omitted).

[30] *See* note 5, *supra*.

one or both of these patches are developed.[31] Therefore, Pactel has not demonstrated good cause at this time for a waiver of the 1995 access time standards.

VI. ORDERING CLAUSE

20. Accordingly, pursuant to the authority contained in Sections 0.91(a) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 (a) and 0.291, . IT IS ORDERED that the petition for waiver filed January 21, 1992 by Pactel IS HEREBY GRANTED IN PART AND DENIED IN PART as described in this order.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[31] *See* Pactel Petition at 10.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of

Provision of Access
for 800 Service

ORDER

Adopted: July 28, 1992; Released: July 28, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 6, 1992, United Telephone Companies (United) filed a petition for waiver of the access time standards for 800 data base access, established in the Memorandum Opinion and Order on Reconsideration in this docket.[1] We now grant United its requested waiver of the March 1993 access time standard but deny, without prejudice, its requested waiver of the March 1995 standard.

II. BACKGROUND

2. The Reconsideration Order established revised access time standards for the implementation of the 800 data base system. Under the revised standards, each LEC may replace the current NXX access system with mandatory data base access when that LEC can reduce access times for 97% of its originating 800 data base access traffic to five seconds or less, provided that, within two years thereafter, (a) none of its 800 data base traffic experiences an access time of greater than five seconds, and (b) the mean access time for all of its 800 data base traffic is 2.5 seconds or less. The Commission required the Bell Operating Companies (BOCs) and GTE to meet the first tier requirement (the 5-second/97% standard) by March 1993.[2]

3. The revised standards reflected a careful balancing of the benefits of the data base system, most notably, 800 number portability, with the costs of increased access delays. They were also the product of undisputed industry data about access times under both the current NXX system and the data base system. In particular, the Commission relied on an industry consensus at the time that: (1) access times under NXX access are 1.9 seconds, if the IXC interconnects at the end office, and 3.5 seconds, if the IXC interconnects at a tandem; (2) about 2/3 of current NXX traffic is delivered directly from the end office (so that the mean access time today is about 2.5 seconds); and (3) access times under a data base system would be 0.8 seconds, 1.0 seconds, 4.1 seconds, 4.8 seconds, or 8.1 seconds, depending upon the configuration of the originating LEC's network and the level of SS7 deployment in that network.[3]

III. UNITED'S WAIVER PETITION

4. United claims that it has diligently pursued implementation of its 800 data base system and will be able to implement 800 data base access by March 3, 1993. Nevertheless, it states, because of the multitude of complex tasks it must perform, and the unexpected costs it must incur, it cannot fully meet the Commission's access time standards within the time frames specified in the Reconsideration Order.[4]

5. United states that the requirements of the Reconsideration Order are significant, even for the BOCs and GTE. It states these requirements are particularly burdensome for United since United operates in seventeen geographically diverse jurisdictions with a variety of network architectures. It notes, for example, that the network of United Telephone - Midwest (UTM) includes 384 central offices, each of which serves an average of only 1458 access lines, and several access tandems that are not compatible with SS7.[5] United maintains that it is pursuing aggressive SS7 implementation plans and that it cannot further accelerate these plans so as to meet the March 1993 access time requirements without posing undue risks to network reliability. The following chart sets forth the revised access times United proposes:[6]

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[1] *See* Provision of Access for 800 Service, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991) (*Reconsideration Order*). As defined in the Reconsideration Order, "access time" is the time that begins when the caller completes dialing an 800 call and ends when the call is delivered by the originating local exchange carrier (LEC) to an interexchange carrier (IXC). Callers experience additional delay as the IXC then completes the call through its network and the terminating LEC's network to the 800 subscriber. *Id.* at note 4.

[2] 6 FCC Rcd at 5425.

[3] *Id.* at 5422-23, 5425.

[4] *See* United Petition at 6-8.

[5] United Petition at 10.

[6] These access times are as provided in a May 15 letter in which United revises the access time projections contained in its petition for waiver. *See* letter from Jay C. Keithley, Vice President Law and External Affairs, United, to Donna Searcy, Secretary, FCC, May 15, 1992 (May 15 letter). United states that after it prepared its petition, the BOCs released the Bellcore "800 Database Access Time Study," which demonstrated that access times under NXX and 800 data base access would be different -- and generally higher -- than previously assumed. United's May 15 letter revises its petition for waiver to incorporate this revised data, as well as the effect of additional access time improvements that could be achieved through software upgrades from switch vendors.

Date	Percentage of Traffic Less Than: 5 Seconds	5.5 Seconds	6 Seconds	6.5 Seconds[7]	Mean
3/93	78				4.04
9/93	94				2.84
3/95	97				2.33
12/97	100				1.80

6. United states that while it cannot meet the 5 second/97% standard in March 1993, it will be able to achieve a mean access time by that date that is more than one half second lower than its current average NXX access time. Moreover, it states, by September 30, 1993, it will be able to achieve a fivesecond access time for 94% of its traffic and a mean that is 1.76 seconds lower than the current NXX mean.[8] It states that in no case will the incremental increase in access times for data base versus NXX access exceed three seconds.[9]

7. United also asks us to waive the March 1995 requirement that all access times be 5 seconds or less. It states that to satisfy this requirement, it would have to upgrade prematurely six tandem switches that are currently incapable of using SS7 signaling. Premature upgrade of these switches, it states, would be unreasonably costly and would require a wholesale change of existing priorities.[10] It asks that it be given until December 1997 to accomplish this work.

IV. POSITIONS OF OTHER PARTIES

8. Commenting parties address United's waiver request in conjunction with similar waiver requests filed by other LECs. AT&T, CompTel, NDC, and ARINC generally oppose the LEC waivers. VISA also opposes the waivers, pending more detailed information on their impact on users. USTA, Centel, MCI, and Sprint support them, although MCI supports a waiver only of the 1993 access time standard at this time. Other parties, such as Ad Hoc, ICA, and Cable & Wireless neither support nor oppose the waivers in their comments, pending further information.[11]

9. Parties opposing the waivers claim that the LECs do not adequately support their claims that waivers are necessary and warranted. For example, AT&T argues that LEC claims as to the cost of complying with the access time standards are not substantiated.[12] Similarly, CompTel and ARINC assert that LECs have not demonstrated that acceleration of their SS7 deployment plans would jeopardize network reliability.[13] They argue that waivers should not be granted unless LECs provide more detailed substantiation of LEC network reliability concerns, including quantification of the risks of outages or increased blockage. AT&T and ARINC claim, further, that the waivers would upset the careful balancing of interests incorporated into the access time standard and would degrade the quality of 800 access service.[14] In addition, several parties state that LECs did not provide sufficient information about the parameters of the tests underlying the new access time estimates. They argue that without this information they cannot assess the accuracy or completeness of the revised data or its impact on IXCs or end users.[15] Finally, NDC argues that the waivers are really untimely petitions for reconsideration of the access time standard insofar as they assume the invalidity of that standard.[16]

10. Parties supporting the waivers claim that the small increase in access times that the waivers would permit is acceptable, at least for March 1993.[17] MCI urges that the Commission grant a blanket waiver that would permit LECs to implement mandatory data base access when 95% of its traffic experiences an access time of 6 seconds or less. MCI opposes LEC requests for a waiver of the 1995 access time standards, claiming that it is premature to address these requests at this time, particularly since technological developments and changed network deployment plans may render these waivers unnecessary.[18]

11. Parties that neither support nor oppose the waivers express more concern about the reliability and firmness of the access time data set forth in the LEC waivers than with the revised access time standards proposed in the waiver petitions.[19] Most of these parties echo other parties' concerns that the LECs did not provide sufficient information about how the access time tests were conducted.[20] In addition, Ad Hoc notes that some LECs do not specifically commit to achieving the access times set forth in their waiver petitions, and it asks for such commitments.[21] Several parties also decline to take a position pending the availability of various additional information about the extent to which nonconforming access times would exceed five seconds and the geographic distribution of traffic with higher access times.[22]

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[7] These access time projections represent United's capabilities -- not the actual access times that will occur. In other words, these data assume that IXCs use SS7 interconnection wherever United makes it available. If some IXCs do not elect to use SS7 interconnection, those IXCs' access times will be longer. These projections also assume, of course, that the 800 data base implementation process proceeds as planned, and in particular, that LEC/IXC SS7 interconnection testing and trunk conversions scheduled over the next six to eight months occur on schedule.

[8] May 15 letter at 2-3.

[9] May 15 letter at 3.

[10] United Petition at 10.

[11] ICA asks us to establish a second pleading cycle on the waiver petitions following receipt of the BOC/GTE Reply to comments on the BOC/GTE 800 Data Base Implementation Plan. ICA Comments at 7.

[12] AT&T Comments at 4.

[13] CompTel Comments at note 7; ARINC Comments at 9.

[14] AT&T Comments at 3-5; ARINC Comments at 1-5.

[15] *See, e.g.*, AT&T Comments at 5-6; CompTel Comments at 4-5; Allnet Comments at 1-2; ICA Comments at 5-6; NDC Reply at 3.

[16] NDC Reply at 6-7.

[17] *See* USTA Comments at 2-3; MCI Comments at 6; Sprint Comments at 13. *Cf.* Ad Hoc Comments at 6 ("A *slight* slippage of access time standards is not itself a terribly adverse matter.")

[18] In reply, some LECs indicate that they would not oppose a deferral of the 1995 waivers at this time. *See* NYNEX Reply at note 9; US West Reply at 16-17.

[19] *See, e.g.*, Ad Hoc Comments at 7-11.

[20] *See, e.g.*, Cable & Wireless Comments at Appendix 1; Ad Hoc Comments at 10-11.

[21] Ad Hoc Comments at 9.

[22] *See, e.g.*, ICA Comments at 7-11. *See also* NDC Comments at 9-12; VISA Comments at 3-7. ICA states that each LEC should be required to make available "exception lists" showing each end office where access delays in excess of 5.5 seconds may occur. In reply, MCI argues that as the implementation process unfolds and LECs' and IXCs' network reconfiguration plans become more definite, carriers will provide the necessary access

V. DISCUSSION

12. We now grant United's requested waiver of the 1993 access time standards but deny, without prejudice, its request for a waiver of the 1995 access time standards. We believe that United has demonstrated good cause for its requested waiver of the 1993 access time standards, but that it is premature to consider waiving the 1995 standards.

13. Pursuant to Section 1.3 of the Commission's Rules, the Commission may waive any provision of its rules or orders on its own motion or on petition if good cause therefor is shown.[23] In supporting its case for a waiver, an applicant must demonstrate that there are special circumstances that warrant a deviation from the rule and must show how such deviation will serve the public interest.[24] We believe that United has met this burden with respect to the 1993 access time standard.

14. The record shows that in response to the Reconsideration Order, United has pursued implementation of 800 data base access with reasonable diligence. It has conducted a review of the steps necessary to meet the Commission's access time standards, reordered its priorities and a significant portion of its resources to meet these standards, and worked with its switch manufacturers to ensure timely installation of software patches that are designed to improve access times.[25] Indeed, United's move from NXX to data base access will result in a decrease of its average 800 access time by more than half a second. Moreover, by September 1993, United will be able to comply substantially with the five-second/97% standard, achieving access times of five seconds or less for 94% of its traffic.

15. According to United, fully meeting the March 1993 standard would require it to further accelerate its SS7 deployment strategy in a manner that could pose unnecessary risks to network reliability. No one refutes this claim.[26] Given this undisputed representation, and the fact that by March 1993, United will be able to reduce its mean access time below current NXX levels, we believe that the inability of United to meet fully the Commission's 1993 access time standards is not due to any deficiency or laxness in its SS7 deployment plans.

16. We note, further, that since current NXX access times are longer than previously represented, the alternative access times proposed by United would not result in larger increases in access times than the five-second standard contemplated. The Reconsideration Order permitted maximum increases of 3.1 seconds or less for 97% of each LEC's traffic; even with this waiver, United would meet this standard. Thus, a waiver is not inconsistent with the Commission's intent to allow "at the outset of 800 data base access a temporary and limited increase in access times, while requiring shortly thereafter that access times are reduced to levels at least as good as they are today."[27] We therefore find that United has demonstrated good (cause for its requested waiver of the 1993 access time standard.[28]

17. The Commission has time and again emphasized the importance of 800 number portability to consumers and to a fully competitive 800 services marketplace. Thus, for example, in the Reconsideration Order the Commission stated:

> Commenters representing a broad cross-section of interests have stressed, both in this proceeding and in our proceeding examining competition in the interstate interexchange marketplace, the importance of 800 number portability. We concur. The records in these proceedings demonstrate that number portability will not only increase competition in the 800 services marketplace, but provide customers with more flexibility and more options in designing their 800 service.[29]

The waiver that we now grant will help ensure that the public receives these significant benefits as quickly as possible. At the same time, given the limited scope of this waiver, we are confident that it will have only a minor impact on 800 access times.

18. In finding that the public interest would be served by a waiver of the 1993 access time standard, we emphasize that we condition this waiver on United's commitment to achieve the access time capabilities described in its

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time information to end users. MCI states that the need for "exception lists," as recommended by ICA is "not obvious." MCI Reply at 6.

[23] 47 C.F.R. § 1.3.

[24] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990).

[25] *See* United Petition at 7. *See also* May 15, 1992 letter at 2.

[26] While some parties argue that LECs should be required to quantify the risks to network reliability before receiving waivers, such risks are inherently incapable of quantification. Virtually all parties agree that meeting the March 1993 deadline is in itself an ambitious undertaking. Parties also agree that considerable efforts must be made -- even with these waivers -- to ensure that all network changes are adequately tested and that the cutover to 800 data base access proceeds in an operationally sound and nondisruptive manner. *See, e.g.*, AT&T Comments at 6-7; NDC Reply at 4-5. Given the substantial amount of work that is already being perfomed under tight deadlines, we are satisfied that the additional network changes necessary to meet fully the 1993 five-second access time standard could not be accomplished without posing additional, undue risks to network reliability. That these incremental risks cannot be quantified in no way negates their significance.

[27] 6 FCC Rcd at 5425.

[28] We note, also, that LECs have made available to the industry detailed information about their switch configurations and SS7 deployment plans. Under the circumstances, the "exception list" sought by ICA is not necessary. To the extent users seek information about what access times actually will be under a data base system, this can be determined only when IXCs make available their network interconnection plans. We decline to defer consideration of United's waiver petition until all IXCs providing 800 service in United's territory offer this information. We also note that the LECs have responded to the questions raised in the record about the methodology and assumptions used in the new access time tests. *See* BOC/GTE Response to Comments on Implementation Plan for 800 Data Base Access Service, Appendix C. Finally, we reject NDC's argument that the LEC waiver petitions must be viewed as untimely petitions for reconsideration. Each of these petitions, including the United petition at hand, demonstrates good cause for a limited waiver of the 1993 access time standards. Moreover, a waiver is the appropriate procedural vehicle since the circumstances necessitating each waiver and the scope of each waiver request differ.

[29] 6 FCC Rcd at 5426 (footnote omitted).

waiver petition and *ex parte* presentations to Commission staff. In addition, United must deploy, upon availability, the AT&T and Northern Telecom software patches so as to reduce access times to the maximum extent possible.[30]

19. We deny, without prejudice, United's request for a waiver of the 1995 access time standard. While United might be able to demonstrate in the future that good cause exists for a waiver of the 1995 requirements, it is premature to consider such a waiver request at this time. We note that LEC SS7 deployment plans have changed substantially over the course of the last few years, and it is likely that further changes will occur. Moreover, technological developments, including switching software upgrades that are not currently available, may render United's 1995 waiver request unnecessary. Therefore, United has not demonstrated good cause at this time for a waiver of the 1995 access time standards.

VI. ORDERING CLAUSE

20. Accordingly, pursuant to the authority contained in Sections 0.91(a) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 (a) and 0.291, IT IS ORDERED that the petition for waiver filed March 6, 1992, by United IS HEREBY GRANTED IN PART AND DENIED IN PART as described in this order.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[30] *See* note 6, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of

Provision of Access for
800 Service

ORDER

Adopted: July 28, 1992; Released: July 28, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On February 28, 1992, US West filed a petition for waiver of the March 1993 access time standards for 800 data base access, established in the Memorandum Opinion and Order on Reconsideration in this docket.[1] We now grant US West's requested waiver.

II. BACKGROUND

2. The Reconsideration Order established revised access time standards for the implementation of the 800 data base system. Under the revised standards, each LEC may replace the current NXX access system with mandatory data base access when that LEC can reduce access times for 97% of its originating 800 data base access traffic to five seconds or less, provided that, within two years thereafter, (a) none of its 800 data base traffic experiences an access time of greater than five seconds, and (b) the mean access time for all of its 800 data base traffic is 2.5 seconds or less. The Commission required the Bell Operating Companies (BOCs) and GTE to meet the first tier of this requirement (the 5-second/97% standard) by March 1993.[2]

3. The revised standards reflected a careful balancing of the benefits of the data base system, most notably, 800 number portability, with the costs of increased access delays. They were also the product of undisputed industry data about access times under both the current NXX system and the data base system. In particular, the Commission relied on an industry consensus at the time that: (1) access times under NXX access are 1.9 seconds, if the IXC interconnects at the end office, and 3.5 seconds, if the IXC interconnects at a tandem; (2) about 2/3 of current NXX traffic is delivered directly from the end office (so that the mean access time today is about 2.5 seconds); and (3) access times under a data base system would be 0.8 seconds, 1.0 seconds, 4.1 seconds, 4.8 seconds, or 8.1 seconds, depending upon the configuration of the originating LEC's network and the level of SS7 deployment in that network.[3]

III. US WEST'S WAIVER PETITION

4. US West states that after the release of the Reconsideration Order, and as it began implementing its data base system, it began testing access times using different end office and access tandem switch types.[4] It claims that these tests revealed that, both for NXX access and data base access, access times vary by switch type and that newer digital switches result in longer access times than older switches, which had been used for earlier access time testing. For NXX access, the tests showed that access times are as high as 3.1 seconds for end office connections and 5.8 seconds for access tandem connections.[5] For data base access, the tests showed that for some switches, implementing SS7 interconnection at the access tandem would not reduce access times to under five seconds, as previously assumed. In light of these test results, US West asks for a waiver of the Commission's 1993 access time standards. The following chart sets forth the access times US West proposes in lieu of this standard:[6]

	Percentage of Traffic Less Than:		
Date	**5 Seconds**	**5.5 Seconds**	**6 Seconds**[7]
3/93	90	95	97

5. US West states that because NXX access times are in many cases longer than had been previously represented, its waivers would not result in access time increases ma-

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[1] *See* Provision of Access for 800 Service, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991) (*Reconsideration Order*). As defined in the Reconsideration Order, "access time" is the time that begins when the caller completes dialing an 800 call and ends when the call is delivered by the originating local exchange carrier (LEC) to an interexchange carrier (IXC). Callers experience additional delay as the IXC then completes the call through its network and the terminating LEC's network to the 800 subscriber. *Id.* at note 4.

[2] 6 FCC Rcd at 5425.

[3] *Id.* at 5422-23, 5425.

[4] US West Petition at 5. US West conducted these tests in conjunction with Bellcore and the other BOCs.

[5] US West Petition at 6.

[6] These access time projections represent US West's proposed capabilities -- not the actual access times that will occur. In particular, these data assume that IXCs use SS7 interconnection wherever US West makes it available. If some IXCs do not elect to use SS7 interconnection, those IXCs' access times will be longer. These projections also assume, of course, that the 800 data base implementation process proceeds as planned, and in particular, that LEC/IXC SS7 interconnection testing and trunk conversions scheduled over the next six to eight months occur on schedule. Finally, these projections assume the installation of a software patch in the Northern Telecom DMS-100 switch and in AT&T 5ESS switches that will reduce access times for those switches by up to one second or more. The Northern Telecom patch is currently available, while the AT&T patch is scheduled for availability in November or December 1992.

[7] US West Reply at 6. These access times differ from the access times stated in US West's Petition for Waiver. US West explains that in its waiver petition, it did not adjust access times to reflect proposed switch modifications that are not yet available, and it assumed that all switch configurations not actually measured would yield access times in excess of five seconds. In its reply, US West's revises its projections to incorporate the projected effects of anticipated switch modifications, as well as access time estimates for untested switch configurations derived by Bellcore through regression analysis. *Id.*

terially in excess of the 3.1 second maximum contemplated by the Commission when it adopted a 5-second access time standard.[8]

6. US West asserts, further, that it has already substantially accelerated its network deployment plans and cannot further accelerate these plans without jeopardizing network reliability. US West also argues that denial of its waiver would require it to redirect its SS7 end office deployment plans away from larger offices from which IXCs desire direct trunking and towards smaller offices with switches that cannot achieve tandem-routed access times of less than five seconds.[9]

IV. POSITIONS OF OTHER PARTIES

7. Commenting parties address US West's waiver request in conjunction with similar waiver requests filed by other LECs. AT&T, CompTel, NDC, and ARINC generally oppose the LEC waivers. VISA also opposes the waivers, pending more detailed information on their impact on users. USTA, Centel, MCI, and Sprint support them.[10] Other parties, such as Ad Hoc, ICA, and Cable & Wireless neither support nor oppose the waivers in their comments, pending further information.[11]

8. Parties that oppose the waivers claim that the LECs do not adequately support their claims that waivers are necessary and warranted. For example, AT&T argues that LEC claims as to the cost of complying with the access time standards are not substantiated.[12] Similarly, CompTel and ARINC assert that LECs have not demonstrated that acceleration of their SS7 deployment plans would jeopardize network reliability.[13] They argue that waivers should not be granted unless LECs provide more detailed substantiation of LEC network reliability concerns, including quantification of the risks of outages or increased blockage. AT&T and ARINC claim, further, that the waivers would upset the careful balancing of interests incorporated into the access time standard and would degrade the quality of 800 access service.[14] In addition, several parties state that LECs did not provide sufficient information about the parameters of the tests underlying the new access time estimates. They argue that without this information they cannot assess the accuracy or completeness of the revised data or its impact on IXCS or users.[15] Finally, NDC argues that the waivers are really untimely petitions for reconsideration of the access time standard insofar as they assume the invalidity of that standard.[16]

9. Parties supporting the waivers claim that the small increase in access times that the waivers would permit is acceptable, at least for March 1993.[17] MCI urges us to grant a blanket waiver that would permit LECs to implement mandatory data base access when 95% of its traffic experiences an access time of 6 seconds or less.[18]

10. Parties that neither support nor oppose the waivers express more concern about the reliability and firmness of the access time data presented by the LECs than with the revised access time standards proposed in the LEC waivers.[19] Most of these parties assert that LECs did not provide sufficient information about how the access time tests were conducted.[20] In addition, Ad Hoc notes that some LECs did not specifically commit to achieving the access times set forth in their waiver petitions, and it asks for such commitments.[21] Several parties also decline to take a position pending the availability of various additional information about the extent to which nonconforming access times would exceed five seconds and the geographic distribution of traffic with higher access times.[22]

V. DISCUSSION

11. We now grant US West's requested waiver of the 1993 access time standard. We believe that US West has demonstrated good cause for a waiver of this standard.

12. Pursuant to Section 1.3 of the Commission's Rules, the Commission may waive any provision of its rules or orders on its own motion or on petition if good cause therefor is shown.[23] In supporting its case for a waiver, an applicant must demonstrate that there are special circum-

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[8] *See* letter from Jeffrey Bork, Attorney-Federal Relations, US West, to Gary Phillips, Special Counsel, Policy and Program Planning Division, Common Carrier Bureau, April 20, 1992. In that letter US West notes that three of its switch configurations account for access time increases of more than 3.2 seconds. US West further notes, however, that all three configurations include an AT&T 5ESS switch as an access tandem, and that AT&T has said that it can reduce the access times of its 5ESS switch by over one second. With this reduction, no US West traffic would experience access time increases of more than 3.2 seconds.

[9] US West Reply at 12.

[10] Sprint initially opposed US West' waiver request, but upon seeing US West's revised access time numbers in US West's Reply, withdrew its opposition. *See* letter from Norina Moy, Manager, Federal Regulatory Affairs, US Sprint, to Donna Searcy, Secretary, FCC, May 22, 1992.

[11] ICA asks us to establish a second pleading cycle on the waiver petitions following receipt of the BOC/GTE Reply to comments on the BOC/GTE 800 Data Base Implementation Plan. ICA Comments at 7.

[12] AT&T Comments at 4.

[13] CompTel Comments at note 7; ARINC Comments at 9.

[14] AT&T Comments at 3-5; ARINC Comments at 1-5.

[15] *See, e.g.*, AT&T Comments at 5-6; CompTel Comments at 4-5; Allnet Comments at 1-2; ICA Comments at 5-6; NDC Reply at 3. .

[16] NDC Reply at 6-7.

[17] *See* USTA Comments at 2-3; MCI Comments at 6; Sprint Comments at 13. *Cf.* Ad Hoc Comments at 6 ("A *slight* slippage of access time standards is not itself a terribly adverse matter.")

[18] MCI Comments at 6.

[19] *See, e.g.*, Ad Hoc Comments at 7-11.

[20] *See, e.g.*, Cable & Wireless Comments at Appendix 1; Ad Hoc Comments at 10-11.

[21] Ad Hoc Comments at 9.

[22] *See, e.g.*, ICA Comments at 7-11. *See also* NDC Comments at 9-12; VISA Comments at 3-7. ICA states that each LEC should be required to make available "exception lists" showing each end office where access delays in excess of 5.5 seconds may occur. In reply, MCI argues that as the implementation process unfolds and LECs' and IXCs' network reconfiguration plans become more definite, carriers will provide the necessary access time information to end users. MCI states that the need for "exception lists," as recommended by ICA is "not obvious. " MCI Reply at 6.

[23] 47 C.F.R. § 1.3.

stances that warrant a deviation from the rule and must show how such deviation will serve the public interest.[24] We believe that US West has met this burden.

13. The record shows that in response to the Reconsideration Order, US West has undertaken an aggressive SS7 deployment schedule. For example, by March 1993, it will install Service Switching Point and SS7 interconnection capabilities at all 57 of its tandem switches and at 270 end offices serving half its 800 traffic.[25] With this deployment, it states, no IXCs will have to encounter access delays of eight seconds, even though the Commission's 97% standard contemplated up to three percent of US West traffic with delays of this magnitude.[26] By the end of 1993, it states, it will deploy SS7 at more than 100 other end offices, which collectively serve an additional fourteen percent of its traffic.[27] Thus, the inability of US West to satisfy the 1993 access time standard is not due to the laxness of its SS7 efforts.

14. At the same time, it does not appear that it would be feasible for US West to meet the 1993 access time standard. According to US West, meeting this standard would require it to deploy SS7 at end offices representing 82% of its access lines. This, it states, would require it to replace approximately 200 end office switches that are not now compatible with SS7 technology and to install software, hardware and facilities to over 400 switches. We agree with US West that it would be extremely difficult, if not impossible, to engineer, order, manufacture, install, and test this equipment by March 1993.[28]

15. We note, further, that since current NXX access times are longer than previously represented, the alternative access times proposed by US West would not result in materially larger increases in access times than the five-second standard contemplated.[29] The Reconsideration Order permitted maximum increases of 3.1 seconds or less for 97% of each LEC's traffic; even with this waiver, US West would substantially meet this standard. Thus, a waiver is consistent with the Commission's intent to allow "at the outset of 800 data base access a temporary and limited increase in access times, while requiring shortly thereafter that access times are reduced to levels at least as good as they are today."[30] Under the circumstances, we find that US West has demonstrated good cause for its requested waiver of the 1993 access time standard and that this waiver would be in the public interest.[31]

16. The Commission has time and again emphasized the importance of 800 number portability to consumers and to a fully competitive 800 services marketplace. Thus, for example, in the Reconsideration Order the Commission stated:

> Commenters representing a broad cross-section of interests have stressed, both in this proceeding and in our proceeding examining competition in the interstate interexchange marketplace, the importance of 800 number portability. We concur. The records in these proceedings demonstrate that number portability will not only increase competition in the 800 services marketplace, but provide customers with more flexibility and more options in designing their 800 service.[32]

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[24] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990).

[25] US West Reply at 10; letter from Jeffrey Bork, Attorney-Federal Relations, US West, to Gary Phillips, Special Counsel, Policy and Program Planning Division, Common Carrier Bureau, April 20, 1992.

[26] US West Reply at 10.

[27] *Id.*

[28] While some parties argue that LECs should be required to quantify the risks to network reliability before receiving waivers, such risks are inherently incapable of quantification. Virtually all parties agree that meeting the March 1993 deadline is in itself an ambitious undertaking. Parties also agree that considerable efforts must be made -- even with these waivers -- to ensure that all network changes are adequately tested and that the cutover to 800 data base access proceeds in an operationally sound and nondisruptive manner. *See, e.g.*, AT&T Comments at 6-7; NDC Reply at 4-5. Given the substantial amount of work that is already being perfomed under tight deadlines, we are satisfied that the additional network changes necessary for US West to meet fully the 1993 five-second access time standard could not likely be accomplished at all by March 1993, and certainly not without posing additional, undue risks to network reliability. That these incremental risks cannot be quantified in no way negates their significance.

[29] The five-second access time standard was not based on empirical data indicating that access times greater than five seconds are *per se* unacceptable. Rather, the standard was based on: (1) data indicating that data base system access times would be either 1 second or less, 4.1 seconds, 4.8 seconds, or 8.1 seconds; (2) a consensus among the parties that access times of 4.1 or 4.8 seconds could be achieved at far less cost than access times of 1 second; and (3) data showing current NXX access times to be either 1.9 or 3.5 seconds. All of these assumptions now turn out to be incorrect. The architectures that were thought to produce access times of 4.1 or 4.8 seconds sometimes result in access times of more than five seconds. Meeting the five second standard would thus be far more burdensome than previously thought.

[30] 6 FCC Rcd at 5425.

[31] We note, also, that US West has made available to the industry detailed information about its switch configurations and SS7 deployment plans, so that US West's access time capabilties can be determined on an end office-by-end office basis. Under the circumstances, the "exception list" sought by ICA is not necessary. To the extent users seek information about what access times actually will be under a data base system, this information can be determined only when IXCs make available their network interconnection plans. We decline to defer consideration of US West's waiver petition until all IXCs providing 800 service in US West territory offer this information. We also note that LECs have responded to questions raised in the record about the methodology and assumptions used in the new access time tests, and we are satisfied that these test results are reliable. *See* BOC/GTE Response to Comments on Implementation Plan for 800 Data Base Access Service, Appendix C. Finally, we reject NDC's argument that the LEC waiver petitions must be viewed as untimely petitions for reconsideration. Each of these petitions, including the US West petition at hand, demonstrates good cause for a limited waiver of the 1993 access time standard. Moreover, waivers are the appropriate procedural vehicle insofar as the circumstances necessitating each waiver and the scope of each waiver request differ from LEC to LEC.

[32] 6 FCC Rcd at 5426 (footnote omitted).

The waiver that we now grant will help ensure that the public receives these significant benefits as quickly as possible. At the same time, given the limited scope of this waiver, we are confident that it will have only a minor impact on 800 access times.

17. In granting US West its requested waiver of the 1993 access time standards, we emphasize that we require US West to achieve the access time capabilities represented in its Reply and *ex parte* presentations. This means that US West must deploy SSP and SS7 interconnection capabilities at end offices serving 49% of its traffic and at all of its tandems, as it states it will do. In addition, in order to reduce access times to the maximum extent possible, we require US West to deploy fully the Northern Telecom and AT&T software patches that are available now or are projected for availability later this year.[33]

VI. ORDERING CLAUSE

18. Accordingly, pursuant to the authority contained in Sections 0.91(a) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 (a) and 0.291, IT IS ORDERED that the petition for waiver filed February 28, 1992 by US West IS HEREBY GRANTED as described in this order.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[33] *See* note 6, *supra*. While US West's proposed access times assume deployment of both patches, US West states that "it is still evaulating whether AT&T's 5ESS modification can be cost justified. " US West Reply at 7. We now make clear that this waiver is granted on the condition that AT&T's patch is implemented in all switches for which it can be used and that US West must upgrade the generics of such switches if necessary to accommodate this patch.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

DAVID A. BAYER File No. 00061-CL-TC-1-91

For transfer of control of CyberTel Corporation, licensee of station KNKN201, in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 385, Hawaii 1 - Kauai RSA, to Ameritech Corporation

DAVID A. BAYER File No. 00062-CL-TC-1-91

For transfer of control of CyberTel Cellular Telephone Company, licensee of station KNKA234, in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 11, St. Louis, Missouri MSA, to Ameritech Corporation

DAVID A. BAYER File No. 00063-CL-TC-1-91
and 900 CELLULAR File No. 00064-CL-TC-1-91
INVESTORS LIMITED File No. 00065-CL-TC-1-91
PARTNERSHIP File No. 00066-CL-TC-1-91
File No. 00067-CL-TC-1-91

For transfer of control of CyberTel RSA Cellular, L.P., licensee of stations KNKN570, KNKN377, KNKN508, KNKN379, KNKN568, in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 510, Missouri 7 - Saline RSA, Market 511, Missouri 8 - Callaway RSA, Market 513, Missouri 10 - Benton RSA, Market 521, Missouri 18- Perry RSA, and Market 522, Missouri 19 -Stoddard RSA, to Ameritech Corporation

In re Authorizations of

CYBERTEL CORPORATION File No. 07542-CL-L-91

Petition to revoke authorization for station KNKN201, in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 385, Hawaii 1 - Kauai RSA

CYBERTEL CELLULAR TELEPHONE COMPANY File No. 01652-CL-L-91
File No. 163500-92-09-PG

Petition to revoke authorization and notice of apparant liability for forfeiture penalty for station KNKA234, in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 11, St. Louis, Missouri MSA

CYBERTEL RSA CELLULAR, L.P. File No. 01840-CL-L-91
File No. 00170-CL-L-91
File No. 00454-CL-L-91
Petition to revoke authorizations for stations KNKN570, KNKN377, KNKN508, KNKN379, KNKN568, in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 510, Missouri 7 - Saline RSA, Market 511, Missouri 8 - Callaway RSA, Market 513, Missouri 10 - Benton RSA, Market 521, Missouri 18- Perry RSA, and Market 522, Missouri 19 -Stoddard RSA, and notice of apparant liability for forfeiture penalty for station KNKN570 in Market 510, Missouri 7 -Saline RSA and station KNKN377 in Market 511, Missouri 8 - Callaway RSA
File No. 01700-CL-L-91
File No. 09521-CL-L-91
File No. 163500-92-08-PG

MEMORANDUM OPINION AND ORDER, AND NOTICE OF APPARENT LIABILITY

Adopted: July 27, 1992; Released: July 28, 1992

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. Columbia Cellular Partnership (Columbia) has filed an application for review of the Mobile Services Division's (MSD's) decision not to reconsider grant of CyberTel Corporation, CyberTel Cellular Telephone Company, and CyberTel RSA Cellular, L.P.'s (collectively, CyberTel's) applications for transfer of control to Ameritech Corporation (Ameritech). Columbia has also filed a petition to revoke CyberTel's authorizations. In this order we (1) deny the application for review, (2) deny the petition to revoke and (3) issue CyberTel a notice of apparent liability for forfeiture in the amount of five hundred and five thousand dollars ($505,000).

2. The captioned applications request consent to transfer control of CyberTel from David A. Bayer and 900 Cellular Investors Limited Partnership to Ameritech. No petition to deny was filed and the MSD granted the applications. Columbia filed a petition for reconsideration,[1] which the MSD dismissed on procedural grounds.[2] Columbia has now filed an application for review and a petition to revoke CyberTel's authorizations.

II. DISCUSSION

A. Transfer of Control

3. The MSD noted, in dismissing Columbia's petition for reconsideration, that Columbia failed to show good cause why its objections to the transfer could not have been raised in a timely filed petition to deny. Columbia argues that some of the alleged violations began only three days prior to the deadline for filing petitions to deny. Given that Columbia has justified its failure not to participate earlier with respect to these allegations, as well as the overlapping nature of the allegations and the pendency of the petition to revoke, we will consider all of Columbia's allegations on the merits.

4. We find that Columbia has provided no substantive grounds for reversing the transfer grant. Columbia argues that we should hold a hearing to reassess CyberTel's character qualifications, and determine whether CyberTel's authorizations should be revoked, before giving final approval to the transfer. As discussed below, we have reviewed the entire record and determined that revocation is not warranted. Accordingly, there is no basis for reversing the MSD's grant of the transfer applications.[3]

B. Revocation

5. Columbia argues that CyberTel's authorizations should be revoked pursuant to Section 312(a) of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. Section 312(a).[4] Under Section 312, the Commission may revoke an authorization for willful or repeated violations of the Act, the Commission's rules or a Commission authorization. However, the decision to initiate revocation proceedings is a matter wholly within the Commission's discretion and the Commission may refuse to begin revocation proceedings even if violations are shown to exist. *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 513-14 (1988), *as supplemented*, 4 FCC Rcd 7299 (1988), *appeal dismissed by judgment sub nom. TeleSTAR, Inc. v. FCC*, 901 F.2d 1131 (D.C. Cir. 1990) (Table).[5]

6. *Technical Violations*. Columbia argues that, in the Missouri 8 - Callaway RSA (Missouri 8 RSA), CyberTel operated its Fulton cell with an improperly installed metal antenna reflector,[6] and its Holts Summit cell with improperly installed metal antenna reflectors and antennas. Columbia also states that, in the Missouri 7 -Saline RSA (Missouri 7 RSA), CyberTel operated its Boonville cell with an improperly installed metal antenna reflector and antenna. Finally, Columbia states that, in the St. Louis, Missouri MSA, CyberTel operated its Anaconda cell without a required antenna reflector.[7] As a result, the radio signals from these cell sites were not properly directionalized, and the 39 dBu contours extended into neighboring cellular markets including Columbia's MSA. Columbia argues that these violations resulted in improved coverage for CyberTel and helped CyberTel achieve hand-off across the Columbia MSA.[8] Therefore, Columbia concludes, the violations must have been deliberate.

7. CyberTel has admitted each of the alleged violations, and indicates that they were due to mistakes by independent contractors and CyberTel staff, but were not part of an intentional plan to expand coverage. In addition, CyberTel has shown that the above violations at the Fulton and Boonville cells were not necessary to achieve hand-off. CyberTel also indicates that the violations did not only result in coverage gains in neighboring markets but also caused some coverage loss within CyberTel's own markets.[9] While CyberTel improperly installed antennas and operated at unlawful power levels, the record does not show that there was an intent by CyberTel's senior managers or owners to violate the rules or to further any unlawful scheme.[10] For inadvertent technical violations of the type involved here, we believe that CyberTel's qualifications to be a Commission licensee are not called into question and that a forfeiture rather than revocation is the appropriate sanction.[11] *See e.g., MCI*, 3 FCC Rcd at 514; *Virginia RSA 6 Cellular Limited Partnership*, 6 FCC Rcd 405, 407 (1991).

8. *Misrepresentation*. Columbia argues that CyberTel made misrepresentations to the Commission when it filed FCC Forms 489 indicating that the cells were constructed as authorized and in its opposition[12] in which CyberTel failed to disclose the operation at unauthorized power levels at Anaconda. Finally, Columbia argues that a declaration attached to the opposition contained a misrepresentation because it indicates that there were no discrepancies from the authorized design for the Holts Summit cell. It states that antennas and antenna reflectors were improperly installed at Holts Summit, and that CyberTel reconfigured the antennas during the course of this proceeding.

9. CyberTel states that the violations at Boonville, Anaconda and Holts Summit were due to inadvertent errors, and that there was no intent to deceive the Commission by filing incorrect FCC Forms 489 for these cells.[13] CyberTel also states that its initial failure to report overpower operation at Anaconda was due to a misunderstanding regarding certain technical information, and that this matter was voluntarily disclosed to the Commission in a subsequent pleading.[14] Finally, CyberTel states that there was no intent to deceive the Commission regarding the Holts Summit cell. CyberTel argues that it merely intended to indicate that at Holts Summit, unlike the other cells, there was no 39 dBu contour extension and that it was operating in accordance with its authorized design.[15] The facts before us augur against any intentional misrepresentation by CyberTel.

10. *Plastic Reflectors.* Columbia also argues that CyberTel operated its Fulton, Danville and Warrenton cell sites, in the Missouri 8 RSA, with plastic antenna reflectors.[16] As a result, the radio signals from these cell sites were not properly directionalized, and the 39 dBu contours extended into neighboring cellular markets including Columbia's MSA. Columbia challenges CyberTel's explanation that the use of plastic reflectors occurred through the independent, unauthorized action of a staff engineer and a former supervisor.[17] Columbia argues that this explanation is implausible because the engineers would have no motive to install plastic reflectors on their own, and because such a matter could not be kept secret. Columbia also argues that even if CyberTel's account is true, under the Commission's *Character Policy Statement* [18] CyberTel is still responsible for the FCC-related misconduct of its employees. Columbia also suggests that this is a case of corporate owners "[m]erely standing back and waiting . . . for the Commission to become aware of [misconduct]." Finally, Columbia argues that the use of plastic reflectors constitutes serious misconduct requiring revocation.

11. CyberTel has submitted sworn statements from a staff engineer, the former supervisor and the three individuals above the former supervisor in CyberTel's chain of command, *viz.*, John Shelton (Shelton), Thomas R. Rudd (Rudd) and David A. Bayer (Bayer).[19] The staff engineer and former supervisor state that they never discussed the plastic reflectors with their superiors, did not believe that their superiors were aware of the plastic reflectors, and were sure that their superiors would not have approved. Shelton, Rudd and Bayer all confirm that they did not know about the plastic reflectors, and that they never suggested, encouraged or instructed the engineers to use such reflectors or to construct cells in any other unauthorized or unlawful manner.

12. Columbia's argument that the two engineers could have no motive for installing fake reflectors is, we believe, adequately rebutted by the sworn statements. The former supervisor himself indicates that there was pressure at CyberTel to get all the coverage legally allowed and that the engineering department, which he headed, considered getting good coverage to be an essential part of their job. Furthermore, the staff engineer explains that he ordered installation of plastic reflectors because he thought this was what his former supervisor wanted, and because he was concerned about disobeying his supervisor's instructions.

13. Similarly, we reject Columbia's allegation that CyberTel's owners and senior managers must have known about the reflectors. There is nothing in the record that convincingly demonstrates the owners or senior managers of Cybertel were responsible for installation of the fake reflectors. While there are allegations by Columbia that certain conversations suggest the possibility of scienter by management, there are explicit statements, under oath and subject to criminal prosecution if false, disavowing any such knowledge. We cannot conclude on the basis of the record before us that Cybertel's owners or senior managers knew about the decision to install the plastic reflectors at three of Cybertel's 59 cell sites.

14. As to Columbia's suggestion that the lack of supervision here was so severe as to constitute a case of corporate owners "[m]erely standing back and waiting . . . for the Commission to become aware of [misconduct]," we note that the sworn statements reveal that Shelton had a concern for and awareness of Commission rules, with at least one specific conversation with the former supervisor about the need to operate cells in an authorized manner. The individuals involved apparently had received training and supervision to know the Commission's rules and were expected to follow them, but in these instances failed to do so. We therefore reject Columbia's allegations of lack of supervision.

15. Finally, we consider CyberTel's installation of plastic reflectors in light of the factors specified in the Commission's *Character Policy Statement*.[20] First, CyberTel's use of plastic reflectors constitutes very serious misconduct which was recent, intentional on the part of the employees involved, and inherently deceptive. It occurred at three separate cell sites. Several other inadvertent technical violations occurred at other CyberTel cells. Against these violations, for which CyberTel is fully responsible under the doctrine of *respondeat superior*, the *Character Policy Statement* requires that we consider mitigating factors. 102 FCC 2d at 1218. One of the factors generally considered is actual involvement by owners or managers in the violative conduct. 102 FCC 2d at 1228; *Bluegrass Broadcasting Co., Inc.*, 43 FCC 2d 990 (1973), *WJPD, Inc.*, 79 FCC 2d 115 (1980) (the Commission declined to revoke authorizations where owners and senior managers were not involved in the misconduct).[21] The record indicates that Cybertel's owners and senior managers were not involved in the misconduct and did not know of its occurrence until after Columbia's petition was filed.[22] When the management of CyberTel discovered the plastic reflectors during an internal investigation which commenced just after Columbia filed its petition, it promptly made the necessary corrections and provided detailed statements to the Commission. CyberTel inspected all 59 of its cellular facilities, as well as all of its paging facilities, to ensure that plastic reflectors were not used at any other locations. In addition, CyberTel made changes in its internal organization and instituted procedures to avoid any similar problems in the future.[23] We also note that there is no previous record of serious misconduct during Cybertel's 21 year history of service, and that the former supervisor purportedly responsible for installing the fake reflectors is no longer employed by CyberTel. All of these corrective and remedial actions constitute mitigating factors that we believe warrant invoking a substantial forfeiture rather than revocation.[24] Cybertel's actions following discovery of the fake reflectors are adequate to suggest that it has "the ability to operate in the public interest with no likelihood of future misconduct." *See* 102 FCC 2d at 1229. We therefore deny Columbia's petition to revoke on the basis of the plastic reflectors.[25]

C. Signal Penetration and Call Hand-off

16. Columbia states that signals from CyberTel's Fulton and Boonville cells continue to extend into Columbia's MSA and that CyberTel is handing-off calls between these two cells and across the Columbia MSA.[26] Columbia asks that the Commission issue a cease and desist order, pursuant to Section 312(b) of the Act, 47 U.S.C. Section 312(b), prohibiting call hand-off between the Fulton and Boonville cells. Columbia contends that the signal extensions and call hand-off (1) violate the Commission's dual licensing scheme by making CyberTel a third cellular carrier in the Columbia MSA, (2) are inconsistent with the Commission's policy of strictly enforcing market boundaries, (3) prevent Columbia from fulfilling its duties of providing local subscriber and roamer service within the

MSA and (4) constitute *de facto* license modification without following the procedures required by Section 316(a) of the Act, 47 U.S.C. Section 316(a).

17. The Commission has used 39 dBu contours in defining cellular service areas. *See* Sections 22.903, 22.504 of the rules.[27] Thus, apart from 39 dBu contour extensions, neighboring markets are protected only against harmful co-channel electrical interference. *See* Section 22.902(a) and (d). *Cf.* Sections 22.903(a),(d), 22.923(c) (39 dBu contour extensions are strictly limited and require prior Commission approval). As long as the 39 dBu contours are entirely contained within a licensee's own market, (1) signal penetration does not make the licensee a carrier in neighboring markets and (2) a cellular license does not confer any right to protection against such signals, except for protection against co-channel interference. Call handoff between the Fulton and Boonville cells, which are on either side of Columbia's MSA, is possible primarily as a result of the natural propagation of signals beyond the 39 dBu contour and the narrow width of the Columbia MSA. CyberTel notes that its antenna problems at Boonville and Fulton have been corrected and that these cells' 39 dBu contours[28] are now entirely contained within CyberTel's RSAs.[29] Finally, Columbia does not state it is receiving harmful co-channel electrical interference. We conclude that no Commission rules or policies have been violated by CyberTel's signal penetration into RSAs 7 and 8 at below 39 dBu, or by cross-market hand-off. Accordingly, Columbia's contentions are without merit.

D. Notice of Apparent Liability

18. We find that CyberTel has operated cell sites in an unauthorized manner at Fulton, Boonville, Holts Summit, Anaconda, Danville, Warrenton, and Marshall, in apparent violation of Section 301 of the Act, 47 U.S.C. Section 301, Section 22.3 of the Commission's rules and CyberTel's authorizations.[30] Furthermore, the operation at Fulton, Boonville, Holts Summit, Anaconda, Danville and Warrenton resulted in unauthorized 39 dBu contour extensions, in apparent violation of Sections 22.903 and 22.923(c)(1) of the rules. CyberTel also made permissive changes at its Marshall cell without notifying the Commission by filing an FCC Form 489, in apparent violation of Section 22.9(d) of the rules. Accordingly, we find that CyberTel is apparently liable for a forfeiture, pursuant to Section 503(b) of the Act, 47 U.S.C. 503(b), for the above violations.

19. CyberTel Cellular Telephone Company operates the Anaconda cell in the St. Louis, Missouri MSA.[31] The Anaconda cell was operated above authorized power,[32] a violation which carries a base forfeiture amount of $50,000. *See Standards for Assessing Forfeiture*, 6 FCC Rcd 4695, 6498 (1991), *on recon.*, FCC 92-212, adopted May 14, 1992. We adjusted this amount upward to $100,000 because of the continuous nature of the violation.[33] *See id.* at 6470. Accordingly, we find that CyberTel Cellular Telephone Company is apparently liable for a forfeiture, pursuant to Section 503(b) of the Act, 47 U.S.C. Section 503(b), of $100,000 for its violation in the St. Louis, Missouri MSA.

20. CyberTel RSA Cellular, L.P. operates the Fulton, Holts Summit, Warrenton and Danville cells in the Missouri 8 RSA.[34] These cells were operated above authorized power, a violation which carries a base forfeiture amount of $50,000. *See id.* at 4698. We adjusted this amount upward to $290,000 after considering that the violation was repeated at four separate cell sites and was continuous,[35] and that the use of plastic antenna reflectors certain of these cell sites involved egregious and intentional misconduct.[36] CyberTel RSA Cellular, L.P. also operates the Boonville and Marshall cells in the Missouri 7 RSA. The Boonville cell was operated above authorized power, and permissive changes were made at the Marshall cell without filing the required FCC Form 489. For operating above authorized power, we used a base forfeiture amount of $50,000, and increased the amount to $100,000 because the violation was continuous.[37] For failing to file the required form, we used a base forfeiture amount of $30,000, *see id.* at 4698, and decreased this amount to $15,000 because this was a minor violation. Thus, the total forfeiture for violations in the Missouri 7 MSA is $115,000. We conclude that, pursuant to Section 503(b) of the Act, CyberTel RSA Cellular, L.P. is apparently liable for a forfeiture of $290,000 for violations in the Missouri 8 RSA, and $115,000 for violations in the Missouri 7 RSA, for a total forfeiture of $405,000.

III. CONCLUSION

21. For the reasons discussed herein, we find that serious rule violations have occurred, but that under the circumstances of this case revocation is not warranted. In addition, we find that the alleged signal penetration and call hand-off from or between CyberTel's properly constructed cells does not violate the Commission's rules or policies. Finally, we find that CyberTel is apparently liable for a forfeiture of five hundred and five thousand dollars ($505,000).

IV. ORDERING PARAGRAPHS

22. Accordingly, IT IS ORDERED that the application for review filed by Columbia Cellular Partnership IS DENIED.

23. IT IS FURTHER ORDERED that the petition for reconsideration, filed by Columbia Cellular Partnership on October 21, 1991, IS DENIED.

24. IT IS FURTHER ORDERED that the petition to revoke filed by Columbia Cellular Partnership IS DENIED.

25. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b) and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, CyberTel Cellular Telephone Company IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of One Hundred Thousand Dollars ($100,000).

26. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b) and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, CyberTel RSA Cellular, L.P. IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Four Hundred and Five Thousand Dollars ($405,000).

27. IT IS FURTHER ORDERED that this Memorandum Opinion and Order and Notice of Apparent Liability SHALL BE EFFECTIVE as of the date of release by the Commission.

28. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to

the order of the Federal Communications Commission, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Columbia is the non-wireline cellular licensee for the Columbia, Missouri MSA.

[2] The applications appeared on Public Notice Report No. CL-91-163, released June 12, 1991; grant appeared on Public Notice Report No. CL-91-189, released July 29, 1991. The MSD dismissed Columbia's petition pursuant to Section 1.106(b) of the Commission's rules for failure to show good cause why Columbia could not participate in the earlier stages of this proceeding. *See* Letter from Chief, MSD to Counsel for Columbia (October 3, 1991).

[3] On October 21, 1991, Columbia filed a petition for reconsideration regarding the MSD's dismissal letter. The petition for reconsideration raises essentially the same issues as are raised in the application for review, and is denied on the same grounds.

[4] We note that in its original petition for reconsideration, and in its application for review, Columbia's focus is that a revocation proceeding under Section 312 be initiated, not that the transfer application be designated for hearing under Section 309 of the Act, 47 U.S.C. Section 309. While we address Columbia's arguments in the context of revocation, we also conclude that none of CyberTel's violations, or the additional allegations against it, raise a substantial and material question of fact regarding its qualifications to be a licensee.

[5] Because petitions to revoke filed by third parties are not cognizable under the Communications Act or our rules, consistent with our prior practice we will treat Columbia's revocation petition as an informal request for Commission action pursuant to Section 1.41 of the rules. *See MCI*, 3 FCC Rcd at 514 n.1. Furthermore, while Columbia's petition to revoke addressed only CyberTel's use of plastic reflectors, we will consider all of the alleged violations in determining whether revocation is warranted.

[6] The Fulton cell was initially constructed with a plastic antenna reflector, at the direction of a CyberTel staff engineer. *See* discussion *infra*. Prior to the start of this proceeding, the staff engineer had the Fulton plastic reflector removed and replaced with a metal reflector.

[7] In its response, CyberTel indicates that the Ancaconda cell was operated above its authorized transmitting power. In addition, CyberTel indicates that permissive changes were made at the Marshall cell, in the Missouri 7 RSA, without notifying the Commission by filing the required FCC Form 489.

[8] Columbia also argues that CyberTel operated its Holts Summit cell above authorized power and failed to disclose certain information during frequency coordination. However, CyberTel indicates that the Holts Summit cell was actually operating below the authorized power level. Furthermore, we find that CyberTel adequately disclosed all information necessary for frequency coordination. Columbia also questions the accuracy of CyberTel's antenna patterns, but CyberTel's engineering consultant indicates that these antenna patterns were calculated using methods the Commission has accepted for fifteen years. We do not find that CyberTel's reliance on these patterns constitutes misconduct warranting revocation or otherwise indicates, even if inaccurate to some *deminimis* degree, an intent to violate the Commission's rules.

[9] We note that not all of this lost coverage was covered by other CyberTel cells.

[10] Columbia also argues that CyberTel's violations must be deliberate because licensees in each of the cellular markets bordering on CyberTel's territory have complained of contour extensions by CyberTel. However, CyberTel states that the above violations were not deliberate and also that an extension into the Alton-Granite City MSA was previously approved by the Commission.

[11] Columbia also complains that CyberTel made permissive changes in the St. Louis MSA without filing the required FCC Forms 489. Form 489 must be filed to notify the Commission of permissive changes. *See* Section 22.9(d) of the rules. CyberTel is currently switching its entire St. Louis MSA system from Motorola to Ericsson equipment. In the case of such system-wide changes, the staff allows cellular licensees to file the FCC Forms 489 in a single package after all changes have been completed. Accordingly, we find that the permissive changes in the St. Louis MSA do not constitute additional rule violations.

[12] *See* CyberTel's August 12, 1991 "Opposition to Petition for Reconsideration" (Opposition).

[13] Furthermore, while the Fulton, Warrenton and Danville cells were intentionally constructed with plastic antenna reflectors, the record indicates that CyberTel's owners and senior managers were unaware of the plastic reflectors at the time the FCC Forms 489 were filed. *See* discussion *infra*.

[14] *See* Opposition at 10 n.6; CyberTel's September 12, 1991 "Consolidated Response to CCP and LFB Replies" (Consolidated Response) at 11.

[15] CyberTel admits that it made adjustments to the Holts Summit antennas, but states that it did so believing that there had been no 39 dBu contour extension. Information in a subsequent Columbia pleading suggests that CyberTel's engineer may have erred in his calculations, and it appears that for approximately two months there was a 39 dBu contour extension at Holts Summit into the Columbia MSA. *See* Columbia's October 1, 1991 "Reply to Consolidated Response," at 9 n.12. However, there is no evidence that CyberTel was aware of this error and we do not find that this matter involves any misrepresentation by CyberTel.

[16] Plastic is a non-conductive, non-reflective material which has no effect on the antenna pattern of the transmitting antenna. A plastic antenna reflector, apart from a conceivable decorative function, serves no useful purpose.

[17] The former supervisor was terminated from CyberTel prior to the start of this proceeding. Sworn statements were obtained from this and other Cybertel employees. *See* discussion, *infra*.

[18] *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *on recon.*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association of Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987). *See also Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd.3448 (1991). Although directly applicable only to broadcast licensees, the policy statement is also used to provide guidance in common carrier cases. *MCI*, 3 FCC Rcd at 515, n.14.

[19] CyberTel also submitted additional sworn statements from the staff engineer and former supervisor in response to questions from the MSD.

[20] These factors include the willfulness, frequency, currency and seriousness of the misconduct, involvement by managers and owners, remedial efforts, past record of compliance, deterrence, and whether the licensee can "show the ability to operate in the public interest with no likelihood of future misconduct." 102 FCC 2d at 1227-29.

[21] We reject Columbia's arguments that these cases were decided prior to the Commission's *Character Policy Statement* and that the policy statement severely curtails a licensee's ability to insulate itself from responsibility for employee misconduct. *See* 102 FCC 2d at 1218, 1228. We conclude that these cases are consistent with the Commission's *Character Policy Statement*.

[22] In arguing that CyberTel's licenses should be revoked, Columbia also relies on *The Telephone Co., Inc.*, 65 FCC 2d 605 (1977); *Otis L. Hale*, 95 FCC 2d 668 (Rev. Bd. 1983), *aff' d* 778 F.2d 889 (1985); *Pass Word, Inc.*, 76 FCC 2d 465 (1980), *aff' d per curiam Pass Word, Inc. v. FCC*, 673 F. 2d 1363 (D.C. Cir. 1982), *cert. denied* 459 U.S. 840 (1982). However, in each of these cases a sole proprietor, principal owner, or officer was involved in the misconduct. The evidence does not establish that principals were involved in the instant case.

[23] CyberTel has merged its MSA and RSA technical organizations and placed them under the direction of a person with 15 years of experience. CyberTel has also provided additional training for its staff, instituted new procedures for site inspections prior to filing FCC Forms 489, and appointed a full time regulatory compliance auditor.

[24] Columbia also argues that CyberTel has not substantially complied with the Commission's rules and therefore will not be entitled to a renewal expectancy at the end of its current license term. *See License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, 7 FCC Rcd 719, 720 (1992), *recon. pending*. The matter of renewal expectancy would properly be considered only in the context of a CyberTel renewal proceeding.

[25] Columbia has requested a hearing regarding CyberTel's violations. We note that under Section 312 of the Act the decision to initiate revocation proceedings is a matter within the Commission's discretion, and that the provisions of Section 309(e) of the Act, requiring a hearing if there is a "substantial and material question of fact," does not apply with regard to revocaton proceedings. *See General Telephone Company of the Southwest*, 5 FCC Rcd 1189, 1190 (1990); MCI, 3 FCC Rcd at 514, 515 n.18. As noted above, we find that, in any event, no substantial and material questions of fact regarding CyberTel's qualifications are raised here.

[26] Columbia explains that its MSA is located directly between CyberTel's Missouri 7 - Saline RSA (RSA 7) and Missouri 8 - Callaway RSA (RSA 8), and that CyberTel is handing-off calls between the Boonville cell in RSA 7 and the Fulton cell in RSA 8. Columbia also asserts that the signal penetration and call hand-off are occurring along a major highway, and are depriving Columbia of revenue.

[27] The Commission's *Second Report and Order*, CC Docket No. 90-6, adopting a new method for determining cellular service areas, has no effect on our decision here.

[28] CyberTel indicates that the 39 dBu contours were calculated according to the standard Carey method, and Columbia has not argued that the Carey method fails to accurately depict the 39 dBu contours. *See* Section 22.903(c).

[29] CyberTel also states that call hand-off is still possible between these cells and is continuing.

[30] CyberTel apparently operated (1) the Fulton cell with an improperly installed antenna reflector, (2) the Boonville cell with an improperly installed antenna, (3) the Holts Summit cell with improperly installed antennas and reflectors, (4) the Anaconda cell without a required antenna reflector and above authorized power, (5) the Marshall cell with an unreflectorized antenna, (6) the Danville cell with a plastic antenna reflector, and (7) the Warrenton cell with a plastic antenna reflector.

[31] CyberTel Cellular Telephone Company is the non-wireline cellular licensee for the St. Louis, Missouri MSA.

[32] The Anaconda cell was operated at a higher effective radiated power than authorized, and without a required antenna reflector. Other cells in other markets, discussed in paragraph 20, *infra.*, were operated with improperly installed antennas or antenna reflectors, or with plastic antenna reflectors. Because these antenna and reflector problems resulted in the radio signals extending farther than authorized, we considered the violation in each instance to be exceeding power limits.

[33] The Anaconda cell was operated without the required antenna reflector through August 6, 1991, and apparently operated at a higher effective radiated power than authorized through September 12, 1991.

[34] CyberTel RSA Cellular, L.P. is the non-wireline cellular licensee for the Missouri 7 and Missouri 8 RSAs.

[35] The violation at the Fulton cell continued through August 7, 1991, at the Holts Summit cell through August 8, 1991, at the Warrenton cell through August 10, 1991, and at the Danville cell through August 10, 1991.

[36] We note that the use of a plastic reflector at the Fulton cell did not occur within the one year statute of limitations provided by Section 503(b) of the Act, 47 U.S.C. Section 503(b), and has not been considered in determining the forfeiture amount. However, overpower operation at the Fulton cell, due to an improperly installed metal antenna reflector, did occur within the limitations period, and has been considered in assessing the forfeiture.

[37] The violation at the Boonville cell continued through August 7, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 17, 1992

INFORMATION ON APPLICATION FILING PROCEDURES FOR THE INTERACTIVE VIDEO AND DATA SERVICE

General Docket No. 91-2

On January 16, 1992, the Commission adopted a *Report and Order* (*R&O*) in GEN Docket No. 91-2 establishing an Interactive Video and Data Service (IVDS) under Part 95 of its Rules (47 C.F.R. Part 95). In the *R&O* the Commission stated that it would announce by Public Notice the date on which it would begin accepting applications for IVDS system licenses as well as other pertinent information concerning licensing IVDS systems. The purpose of this Public Notice is to establish an IVDS application filing window and explain the filing procedures necessary for filing applications for an IVDS system license.

Because there appears to be a substantial number of entities interested in applying for IVDS licenses, we will open up the 734 IVDS service areas or markets in stages. To get some idea of the interest in IVDS, the first stage will be limited to a single service area, service area #1 (New York, NY/NJ). For a description of the service areas see the Commission's January 24, 1992, Public Notice, Report No. 92-40.

Applications for an IVDS license for the New York service area must be received at the official filing location listed herein during the three-day filing period beginning August 18, 1992, and ending August 20, 1992. Applications received before August 18, or after August 20, 1992, will be dismissed as untimely filed. The back-up filing procedure and the extra day policy do not apply to IVDS applications.[1] NOTE: Applicants may have an interest in only one application in each service area.

All applications must be filed on FCC Form 155 and must be accompanied by a separate check made out to the Federal Communications Commission or FCC in the amount of $1,400.00. Failed payment or postdated checks will result in the application being dismissed with prejudice. In Section I of Form 155, the "Applicant Name" block must include the applicant's name (either typed or printed) followed by the signature (original) of an individual authorized to sign the application. The mailing address should be the address to which the applicant wishes official correspondence sent. The number of the service area being applied for (in this case "001") must be specified in the box labeled "Call Sign". The fee type code entered in Column (A) must be "PAI", the fee multiple in Column (B) must be "40", and the fee due in column (C) must be $1,400.00. Each individual application (Form 155) and accompanying check ($1,400.00) must be in an individual sealed envelope and properly addressed (see mail in address). Multiple applications, properly packaged, may be delivered in one larger, properly addressed container.

The Commission's official filing location for these applications is Mellon Bank in Pittsburgh, Pa. Applications may be delivered to Mellon Bank in one of two ways, either mailed in or walked in.

Mail-ins

Filings mailed in must be mailed to:

Federal Communications Commission
Interactive Video and Data Service
P.O. Box 358365
Pittsburgh, PA 15251-5365

(This address must be used on the individually sealed envelopes.)

Walk-Ins

Pursuant to the provisions of 47 C.F.R. § 0.401(b)(2), applications may be hand-delivered. Applications hand-delivered must be in a sealed envelope with the mail-in address specified above on its face. A separate envelope is needed for each application and accompanying check. Hand-delivered applications must be delivered to One Mellon Bank Center, 500 Grant Street, Pittsburgh, PA. 15258 anytime between 12:01 a.m. August 18, 1992, and 11:59 p.m. August 20, 1992.

The street entrance to the Window Filing location is on the Grant Street side of the building (across from the US Air ticket office). Signs will be posted in both One Mellon Bank Center and Three Mellon Bank Center indicating the Filing Window location. The "deliverer" should proceed directly to the street entrance described above and identify himself (herself) as having applications for the IVDS filing window. If a copy is proffered for stamping, *one* receipt only will be date stamped per application and returned. CAUTION: The filing instructions incorporated in this Public Notice are only in effect for the purposes stated herein. These procedures override any other procedures that may be set forth in the Commission's Rules. Failure to follow the filing procedures specified herein will render an application unacceptable for filing. Such an application will be dismissed with prejudice.

After the filing window has closed the Commission will issue a Public Notice as soon as feasible listing the applications filed for the New York service area. In the event the Commission receives more than two acceptable applica-

[1] The back-up filing procedure enables certain applicants to file late if they follow certain procedures and if their applications are lost or delayed in transit to Pittsburgh, Pennsylvania. The extra day policy allows certain applicants to file one day after the filing deadline. These policies, however, only apply to time critical, feeable applications previously filed in Washington, D.C. and IVDS applications, which are new, have never been filed in Washington. Thus, if an IVDS application is received in Pittsburgh on August 21, 1992, the day after the filing window closes, or thereafter (regardless of the reason for delay), the application will be dismissed as untimely filed.

tions for an IVDS system license for this particular service area, all the applications for this service area will be considered mutually exclusive. The Commission will use a lottery conducted in accordance with 47 C.F.R § 1.972 to choose among mutually exclusive applications. If a lottery is necessary, the Commission will announce by Public Notices (1) when a lottery will be held and (2) the lottery winners (tentative selectees). Tentative selectees will then have two business days from the date of the Public Notice announcing the winners to file a FCC Form 574 (plus required showings) amending their original application. The burden will be on the tentative selectees to provide all necessary information. If for some reason one or both of the tentative selectees' applications are dismissed, the Commission will open another filing window for that service area.

While the Commission intends to open all 734 service areas as quickly as possible, it will not issue system licenses until the first IVDS transmitter has been type accepted for operation in this service. Moreover, it is important to remember that an applicant that has been awarded an IVDS system license must meet certain construction benchmarks or automatically lose the license. Further an IVDS system licensee is prohibited from transferring the license until the 5-year construction benchmark has been met.

For further information contact Consumer Assistance Branch, 717-337-1212.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Motorola Satellite Communications, Inc.	**ET Docket No. 92-28 PP-32**

Request for Pioneer's Preference to Establish A Low-Earth Orbit Satellite System in the 1610-1626.5 MHz Band

In the matters of

Ellipsat Corp.; TRW Inc.; Constellation Communications, Inc.	**FOIA Control Nos. 92-83, 92-88, 92-86**

On Request for Inspection of Records

MEMORANDUM OPINION AND ORDER

Adopted: July 24, 1992; **Released: July 27, 1992**

By the Commission:

1. The Commission has before it an Application for Review of Protective Order filed on June 12, 1992 by AMSC Subsidiary Corporation ("AMSC"), an Opposition to it filed on June 26, 1992 by Motorola Satellite Communications, Inc. ("Motorola"), and AMSC's Reply filed July 9, 1992. AMSC seeks review of a Protective Order, DA 92-674, FOIA Control Nos. 92-83, 92-88, 92-86 (May 28, 1992) ("Protective Order"), adopted by the Office of Engineering and Technology ("OET"), limiting access to certain materials submitted by Motorola in ET Docket No. 92-28, PP-32 ("large LEO proceeding"). For the reasons discussed below, we deny the Application for Review.

BACKGROUND

2. On April 10, 1992, Motorola requested confidential treatment, pursuant to Sections 0.457(d) and 0.459 of the Commission's Rules, of certain materials submitted to the Commission in support of its request for a pioneer's preference in the large LEO proceeding. Motorola's request for confidential treatment was served on all applicants and participants in the large LEO proceeding (including AMSC). In response, three other applicants for pioneer's preferences in the large LEO proceeding -- Ellipsat Corp., TRW Inc. and Constellation Communications, Inc. -- filed oppositions to the request for confidential treatment and asked to inspect the submissions pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). These FOIA requests were also served on AMSC. AMSC filed no response to Motorola's request for confidential treatment, nor did it file its own FOIA request or comment on the other participants' FOIA requests.

3. Following an *in camera* inspection of the materials, OET granted in part the FOIA requests but denied access to those materials that "constitute trade secrets and commercial information and therefore are exempt from disclosure," pursuant to Section 0.457(d) of the Commission's Rules, 47 C.F.R. § 0.457(d), and Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552 (b)(4). *See* Letter from David R. Siddall, Chief of the Frequency Allocation Branch of the Federal Communications Commission to Counsel for Ellipsat Corp., TRW Inc., and Constellation Communications, Inc., dated May 4, 1992. As to the exempted materials, OET gave Motorola the following options: (1) withdraw its request for confidentiality and place the materials in the public record; (2) request that the Commission consider the materials in conjunction with Motorola's application subject to a protective order, which would limit public access to the materials; or (3) withdraw the materials from the Commission's consideration. *Id.*

4. On May 11, 1992, Motorola requested that the Commission issue a protective order that would permit only representatives of the parties in the large LEO proceeding to have access to exempted materials for the limited purpose of commenting on Motorola's application. *See* Letter of Philip L. Malet, counsel for Motorola, to David R. Siddall, Chief of the Frequency Allocation Branch of the Federal Communications Commission, dated May 11, 1992.[1] The terms of a draft Protective Order were discussed at a meeting on May 22, 1992, held at the Commission. All applicants for licenses in the large LEO proceeding, including AMSC, were invited to attend the meeting, and all of them did so. The Protective Order was issued on May 28, 1992, and thereafter, the materials were made available for inspection under the terms of the Protective Order. The Protective Order provides that the other parties to the large LEO proceeding may have access to the Motorola materials only for the purpose of commenting on Motorola's application.

5. Comments regarding the documents were due at the Commission on June 12, 1992. The other applicants filed comments in a timely manner and have not appealed OET's FOIA decision or the Protective Order. On the day comments were due, AMSC filed the instant Application for Review of Protective Order, and an associated Motion for Stay in which AMSC now requests a stay of the June 12th comment deadline[2] pending resolution of its Application for Review. In its Application for Review, AMSC states that it has not reviewed the protected materials because it fears that to do so would expose it to a future trade secret misappropriation claim by Motorola. AMSC notes that it is in the process of developing its own technology in many of the areas that appear to be the subject of the materials and that it assumes that at least some of the information submitted by Motorola would qualify as trade secrets. AMSC believes that it would be virtually impossible to establish that it had developed the information itself independently of its review of Motorola's materials. For this reason, AMSC claims that the Protective Order effectively denies AMSC access to the Motorola materials and AMSC thus cannot participate fully in the big LEO proceeding. AMSC therefore urges the Commis-

sion either to provide for unconditional access to the materials or exclude the materials from consideration in the proceeding.

DECISION

6. At the outset, we observe that AMSC's procedural objection to the Commission's consideration of the Motorola materials is grossly untimely. Although AMSC now asserts that the Protective Order unfairly denies it access to these materials, we note that AMSC interposed no objection to Motorola's original request that the Commission review these submissions entirely in confidence, which would have prevented AMSC from having any access to these materials. Having raised no objection at all to Motorola's request for complete confidentiality, we believe AMSC is not in a position to complain now that it unfairly has been denied the ability to comment on these materials. Furthermore, we note that, unlike the other applicants in the large LEO proceeding[3] AMSC also filed no response to Motorola's May 11th letter to the Commission, served on AMSC, which expressly requested that the materials be made available to all parties under a protective order. Rather, AMSC waited until the very last day for reviewing and commenting on the Motorola materials to raise its objections.

7. Nevertheless, we have fully reviewed the merits of AMSC's argument that because it fears a possible trade secret misappropriation suit the Protective Order effectively denies it access to the Motorola materials. We find this claim to be without merit. As Motorola points out, the terms of the Protective Order explicitly provide that restrictions on the use of the information "shall not preclude the use of any material or information in the public domain or which has been developed independently by any other person." Protective Order, para. 5. Thus, the Protective Order specifically recognizes that the applicants examining the materials may develop similar technologies and expressly permits them to use such independently developed information. Such clauses are a standard provision in protective orders and are designed to ensure that parties, like AMSC, who are subject to a protective order are not prevented in any way from utilizing their own technological products or inventions. We therefore conclude that the Protective Order adequately addresses AMSC's concerns.[4]

8. The Protective Order also expressly provides that outside experts may review the confidential materials, so that AMSC could have hired persons outside its firm to assist its counsel in reviewing the materials. Protective Order, para. 4. By this means, AMSC could have completely shielded its technical personnel from access to the documents and thereby further avoided possible questions concerning whether AMSC officials have misappropriated Motorola's trade secrets.[5]

9. Finally, we note that none of the other applicants, who appear to be situated no differently than AMSC, and who have already filed comments on the protected materials, have raised similar concerns.[6] In these circumstances, we think that AMSC's contention that the Protective Order prevents it from commenting on these materials is unfounded. Rather, the Protective Order appears to have been a reasonable means to accommodate Motorola's need to safeguard its confidential information, while preserving the other applicants' ability to comment on these materials.[7] In light of our determination, we will allow AMSC to file comments on the Motorola materials, subject to the terms of the Protective Order, on or before August 3, 1992.[8]

10. Accordingly, for the foregoing reasons, IT IS ORDERED, that the Application for Review IS DENIED and the Motion For Stay IS DISMISSED AS MOOT.

11. IT IS FURTHER ORDERED that AMSC may file comments regarding the materials covered by the Protective Order, DA 92-674, FOIA Control Nos. 92-83, 92-88, 92-86 (May 28, 1992), on or before August 3, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Motorola also requested that certain portions of the materials be returned to it and not be considered by the Commission. These materials have been returned to Motorola.

[2] We note that this Motion for Stay of the reply comment period on Motorola's confidential materials fails to comply with Section 1.46 of our Rules, which requires such a Motion to be filed no less than seven days before a deadline.

[3] *See* Letter of Norman P. Leventhal and Raul R. Rodriguez, Counsel for TRW Inc. to David R. Siddall, Chief of the Frequency Allocations Branch, Office of Engineering and Technology, Federal Communications Commission, dated May 18, 1992; Letter of Linda K. Smith, Robert M. Halperin, and William D. Wallace, Counsel for Loral Qualcomm Satellite Services, Inc. to David R. Siddall, Chief of the Frequency Allocations Branch, Office of Engineering and Technology, Federal Communications Commission, dated May 18, 1992; Letter of Jill Abeshouse Stern, Counsel for Ellipsat Corporation to David R. Siddall, Chief of the Frequency Allocations Branch, Office of Engineering and Technology, Federal Communications Commission, dated May 18, 1992; Letter of Robert A. Mazer, Counsel for Constellation Communications, Inc. to David R. Siddall, Chief of the Frequency Allocations Branch, Office of Engineering and Technology, Federal Communications Commission, dated May 18, 1992.

[4] In its Reply, AMSC indicates that its concern is not merely with its ability to defend a trade secret misappropriation lawsuit, but specifically with a shift in burden of proof, which, according to AMSC, "occurs the moment AMSC reviews the material." AMSC Reply, at 2. We note that regardless of whether the burden of proof is shifted, the likelihood of lawsuit is speculative, and any asserted difficulty in defending such a lawsuit is even more speculative. AMSC's highly speculative concerns simply do not outweigh Motorola's immediate and real need for confidentiality.

[5] The statement of AMSC's Chief Scientist that all qualified outside technical consultants either already work for AMSC or are likely to work for AMSC in the future is contrary to the experience of the Commission. There are numerous qualified individuals who are expert in satellite technology.

[6] AMSC contends that it is in a different position than the other applicants in the large LEO proceeding because it holds an FCC authorization for an MSS system. AMSC Reply, at 2-3. We disagree. Several of the other applicants appear to be at about the same stage of technological development as AMSC. AMSC's co-

applicants all have applications pending for some portion of the frequencies at issue in this docket and none has a license to operate.

[7] Although in some instances the Commission has determined that confidential materials at issue in FCC proceedings should be placed in the public record, in other cases the Commission has concluded that issuance of a protective order also is a reasonable means to accommodate the parties' competing interests. *Compare Amaturo Group, Inc.*, 39 RR2d (1976) *with GTE Corp.*, 53 RR2d 365 (1983) *and MCI Telecommunications Corp.*, 58 RR2d 187 (1985). As to AMSC's general concern that protective orders should not be utilized in pioneer preference proceedings, we note that OET has declined to grant confidentiality requests and issue protective orders "as a routine matter" in pioneer preference proceedings. OET has explained that the routine use of protective orders "would result in a significant new burden upon our staff and delay the completion of such proceedings [and] in turn, would undermine the Commission's purpose in establishing a pioneer's preference licensing scheme to make available to the American public new, innovative technologies and services within the shortest period of time." *See* Letter of Thomas P. Stanley, Chief Engineer, Federal Communications Commission, to Jay L. Birnbaum, Counsel to Echo Group L.P., dated June 3, 1992.

[8] In its Application for Review, AMSC also suggests that OET did not adequately support its May 4, 1992 letter, which denied in part the FOIA requests of Ellipsat, Constellation and TRW. AMSC does not have standing to appeal these FOIA decisions, *see* 47 C.F.R. §0.461 (h)(2), and, moreover, did not pursue a timely appeal of those decisions. *See* 47 C.F.R. §0.461 (h)(2). We thus do not review herein the merits of the OET determination that the Motorola materials are within the ambit of Exemption 4 of the FOIA. We note, however, that to the extent the OET decision was based on the status of the materials as Exemption 4 trade secrets, the analysis suggested by AMSC to determine the "confidentiality" of the materials under Exemption 4, including both the "impairment" and "competitive harm" aspects of that analysis, is not applicable. We further note that, in FOIA proceedings, the Commission is not required to set forth at the administrative level all of its reasons for withholding the requested materials. Any appeal of such FOIA decisions is a *de novo* proceeding in federal district court, in which the agency may raise new arguments and exemptions in support of its decision. Finally, contrary to AMSC's contention, agency decisions to disclose Exemption 4 materials are not governed (or authorized) by the FOIA. *See Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

World Communications, Inc. File No. ENF-91-018
St. Louis, Missouri

Apparent Violations of
Telephone Operator Consumer
Services Improvement Act of 1990

ORDER

Adopted: July 1, 1992; Released: July 14, 1992

By the Commission:

1. On November 8, 1991, the Commission adopted a Notice of Apparent Liability for a Forfeiture (NAL) in which it found that World Communications, Inc. (World) had apparently violated the Communications Act by failing to file an informational tariff on January 15, 1991 as required by the Telephone Operator Consumer Services Improvement Act of 1990.[1] *Notice of Apparent Liability for Forfeiture*, 6 FCC Rcd 6957 (1991).

2. On December 26, 1991, World filed a response to the NAL in which it stated that its informational tariff was timely filed and it provided the following documentary proof:

(1) a copy of World's informational tariff;

(2) a copy of a cover letter for the informational tariff that bears a stamp "FCC/MELLON JAN 15 1991";

(3) a copy of a cancelled check for $490.00, the required filing fee for the informational tariff; and

(4) copies of documents from Federal Express indicating that a delivery was made to the Commission in Pittsburgh and Washington, D.C. on January 15, 1991 at 8:59 and 12:09, respectively.

3. We have reviewed the information provided by World and are satisfied that World timely filed its informational tariff.

4. Accordingly, IT IS ORDERED that, pursuant to Section 504(b) of the Communications Act, 47 U.S.C. § 504(b), and Section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), the Notice of Apparent Liability for a Forfeiture, File No. ENF-91-018, issued against World Communications, Inc. IS CANCELLED.

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[1] Pub. L. No. 101-435, 104 Stat. 986 (47 U.S.C. § 226) (TOCSIA). Section 226(h)(1)(A) of TOCSIA, 47 U.S.C. § 226(h)(1)(A), requires that each operator service provider file an informational tariff with the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-160

In the Matter of

Amendment of Parts 21, 22, 23,
and 25 of the Commission's Rules
To Require Reporting of Station
Frequency and Technical Parameters
for Registration by the Commission
with the International Frequency
Registration Board

NOTICE OF PROPOSED RULE MAKING

Adopted: July 20, 1992; Released: July 30, 1992

Comment Date: September 28, 1992
Reply Comment Date: October 28, 1992

By the Commission:

I. INTRODUCTION

1. By this Notice of Proposed Rule Making (NPRM) we are proposing to create an automated database that will provide the Commission with capability of protecting domestic licensees at risk of harmful electrical interference to and from foreign carriers and improving the reporting of frequency assignments to the International Frequency Registration Board (IFRB).[1] The establishment of such a database necessitates additional reporting requirements for applicants, permittees and licensees in the Domestic Public Fixed Radio, Public Mobile, International Fixed Public Radiocommunication, and Satellite Communications Services under Parts 21, 22, 23, and 25, respectively, of the Commission's rules.[2] More specifically, the requirements would mandate the submission of certain technical operating information by U.S. radio station licensees that operate in geographic areas most likely to require international coordination. This NPRM requests public comment on proposed rules, set forth in Appendix B, that would codify these reporting requirements.

II. BACKGROUND

2. The reporting requirements for frequency coordination contained in International Telecommunication Union (ITU) Radio Regulations and IFRB-prescribed procedures provide for frequency assignments to be notified and registered in the Master International Frequency Register. As a signatory to the ITU Convention (Nairobi, 1982) and the related Radio Regulations, the United States has a responsibility to cooperate with foreign governments in the international management and coordination of spectrum utilization. Recent growth in the use of radio spectrum for domestic, international, terrestrial and satellite communications has generated a greater need to ensure timely, accurate reporting to the IFRB, efficient coordination by the Commission, and improved interference protection for domestic licensees. Current FCC rules do not require Commission applicants, permittees or licensees to report all the data necessary for these purposes, and the data that we have are not in a format that is readily transferable to a computer database. Such a database would facilitate more efficient and accurate frequency assignment reporting, coordination, and submittal to the IFRB, and thereby provide increased protection for domestic carriers in zones at risk of interference to or from foreign stations.

III. DISCUSSION

3. The need for the Commission to maintain accurate and up-to-date records of U.S. licensees has become increasingly important. In the past, licensees in other countries have not used common carrier spectrum as heavily as have our domestic carriers. Consequently, the risk of interference from these foreign carriers was minimal. But rapid telecommunications developments in nearby countries have led to increased foreign usage of the spectrum, with the attendant increase in the potential for harmful interference. This is particularly noticeable in the spectrum used to support geostationary satellites and other services critical to U.S. interests. Various treaties between the United States and foreign governments to reduce the risk of interference through frequency coordination require the U.S. to maintain a registry of stations that may cause interference to foreign stations. The registry would contain the kind of data needed by the IFRB to protect domestic carriers from foreign radio interference. Increased spectrum utilization in areas at risk of harmful interference demands prompt and accurate notification to the IFRB to assure protection of domestic radio licensees from foreign interference. For technical reasons concerning radiowave propagation, the greatest attention needs to placed on those areas of the continental United States near Mexico and Canada, the States of Alaska and Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, American Samoa, and the U.S. Virgin Islands.

4. The United States has reached bilateral agreements with both Mexico and Canada that cover certain radio station licensees in the services within the scope of this NPRM, and discussions continue to be pursued with both countries on a variety of frequency coordination issues.[3] Nevertheless, data from domestic licensees for spectrum not covered by these agreements are still required for the level of interference management we seek.[4]

5. In order to implement an effective interference management system, the Common Carrier Bureau (Bureau) needs a current, accurate and continuously updatable database so that it can quickly meet IFRB notification requirements, respond to IFRB requests and publications and resolve foreign countries' requests for coordination of frequency assignments.[5] Existing Commission databases contain insufficient data to meet these objectives, and the accuracy of these data for this purpose cannot be readily verified. Moreover, some data elements have been erased through usage over time and the data that remains are not in a format that permits the development and use of a readily accessible and updatable database. In addition, some reporting forms the Commission has used to submit technical data to the IFRB do not apply to certain services. To compile the required database, the Bureau needs to

assemble a variety of authorized frequency assignment information. We propose to seek from applicants, permittees and licensees all data elements regarding frequency assignments that the Commission must report to the IFRB. Also included will be data necessary to permit the Bureau to perform monitoring, reporting, and coordinating functions to resolve efficiently matters raised either with foreign governments or through the Treaty Branch of the Commission's Office of Engineering and Technology. The assembly of this information, on a medium that facilitates entry into and the development of the database, will substantially reduce the administrative burden on Commission staff to retrieve and recollate relevant data as well as to track and update records.

6. Based on the foregoing, we are proposing rules (*see* Appendix B) that require domestic radio station licensees to submit data on their frequency and technical parameters in computer readable format as prescribed by each Division for the services affected by this proceeding.[6] We propose that these data reports be solely in magnetic form, on 3 1/2 inch diskettes. This medium will provide the required information in a format that will permit the Commission to build efficiently the database needed and to notify the IFRB in a timely fashion. The resulting database will also enable the staff to minimize hardcopy exchange in making information corrections. Most important, however, we believe that common carriers will benefit by the improved interference protection that the new database resource will achieve. Moreover, the burden on those carriers will be minimal and in some cases even eased by the submission of diskettes instead of paper. The specific data requirements for the diskettes for the different services are illustrated in attachments (*see* Attachments 1-4) to this Notice following the proposed general rules sections.[7]

7. We propose to require existing applicants, permittees and licensees to submit diskettes according to a schedule determined by each Division. In this way we hope to accommodate in a more efficient way the data needed from each service. Applicants for initial authorizations will be required to submit a diskette with all required information when filing their applications. Applicants seeking to amend their applications and permittees and licensees modifying their authorizations will be required to submit updated diskettes. We also request comments on these proposals.

IV. CONCLUSION

8. The proposed requirements are intended to protect domestic radio station licensees from harmful interference from foreign carriers and to facilitate Commission IFRB reporting. We encourage all parties, including small entities, to participate in this proceeding so that we may implement reporting requirements that minimize the administrative burden on both common carriers and the Commission. Pursuant to applicable procedures set forth in section 1.415 and 1.419 of the Commission's rules, 47 C.F.R. Section 1.415 and 1.419, interested parties may file comments on or before September 28, 1992, and reply comments on or before October 28, 1992. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Participants should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

V. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 301, 303(i), 303(r), 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j), 301, 303(i), 303(r), 313 and 314, THAT A RULE MAKING PROCEEDING IS HEREBY INITIATED AND A NOTICE OF PROPOSED RULE MAKING IS ISSUED.

10. IT IS ORDERED that the Secretary shall cause a copy of this Notice of Proposed Rule Making to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (5 U.S.C. Section 603(a)).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The IFRB is a permanent organ of the International Telecommunication Union (ITU), headquartered in Geneva, Switzerland. The IFRB consists of five members elected by the ITU's Plenipotentiary Conference. The IFRB's primary function is to determine that radio frequencies which countries assign to their radio stations are in accordance with the ITU Convention and Radio Regulations and will not cause interference to other countries' stations. If the IFRB decides that a particular frequency assignment satisfies these criteria, it records the frequency assignment in its Master International Frequency Register. By inclusion in the register, a frequency assignment is afforded formal international recognition and protection. *See* para. 2, *infra*. Currently, the Commission must notify the IFRB of domestic common carrier frequency assignments through the submission of standard forms.

[2] While the term "Common Carrier" is used throughout this NPRM, non-common carriers' facilities licensed under Part 25 are also subject to these additional reporting requirements. VSAT facilities authorized under the Part 25 blanket licensing program are also subject to these additional reporting requirements.

[3] Due to existing bilateral agreements with Canada, notification and coordination with the IFRB on trans-Canadian border frequency use appear to be adequate for Fixed and Mobile Services. Therefore, the proposed reporting requirements should not be applicable to licensees in proximity to the Canadian border. With Mexico, there is a bilateral agreement covering cellular systems in the Mobile Service for certain frequency bands, and the rule proposed covers a small part of the spectrum above these bands. In addition, an agreement with Mexico for 6 GHz earth stations was formalized in July, 1991, in connection with the Satellite Communications Service. Data on 6 GHz earth stations near Canada has been provided informally to Canada. However, a

formal agreement concerning earth stations does not yet exist with Canada. Interested parties are asked to comment on the need to apply our proposed rules to this service. Copies of all of the above agreements will be placed in the docket file for this proceeding.

[4] As concerns in regard to frequency coordination arise with both countries in the future, we intend to continue to resolve them on a bilateral basis.

[5] The IFRB publishes a weekly circular that contains the frequency assignment notifications.

[6] The specific rules that we are proposing for the common carrier mobile services in Part 22 of the Commission's rules would be subject to coordination with the pending Rule Making proceeding for the revision of Part 22. *See Revision of Part 22 of the Commission's rules governing the Public Mobile Services (CC Docket 92-115), (NPRM)*, FCC 92-205 (adopted May 14, 1992).

[7] We also invite comment on these attachments, particularly concerning Attachments 3 and 4 in regard to the dependency of earth stations on information for space stations and the need for all of the specific information proposed for submission.

*U.S. Government Printing Office: 1992 — 312-024/60024